No. 3037

United States
Circuit Court of Appeals

For the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3037

United States

Circuit Court of Appeals

For the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

Index. Page

In the District Court of the United States in and for the Northern District of California, Division Two.

(No. 15,660.)

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Complaint.

The Trojan Powder Company, a Corporation, complaining of the Fireman's Fund Insurance Company, a Corporation, for cause of action, alleges:

I.

That at all the times hereinafter mentioned the said Trojan Powder Company, plaintiff above named, was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of New York, having its principal place of business at the City of New York, in said State, and at all of said times was, and still is, a citizen of said State of New York.

II.

That at all the times hereinafter mentioned the Fireman's Fund Insurance Company was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of California, having its principal place of business at the City and County of San Francisco, in said State, and at all of said

times was, and still is, a citizen of said State of California.

III.

That heretofore, to wit, on the 7th day of August, 1912, the said Fireman's Fund Insurance Company did make, issue and [1*] deliver unto the said Trojan Powder Company, its certain policy of marine insurance, wherein and whereby the said Fireman's Fund Insurance Company did insure the said Trojan Powder Company in the sum of Thirty-five Thousand (35,000) Dollars on six thousand (6,000) cases of high explosives laden on board the ship or vessel called the "Pleiades," for a voyage from the port of San Francisco to the port of Balboa, Isthmus of Panama.

IV.

That it was provided in the said policy that the adventures and perils which the said Company is content to bear and does take upon itself in the said voyage so insured as aforesaid, were, among other things, perils of the sea, and all other perils, losses and misfortunes which have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of this insurance, or any part thereof.

That it was further in and by said policy provided that said goods were warranted free from average unless general or the ship or craft be stranded, sunk or burnt, each craft or lighter being deemed a separate insurance. Underwriters notwithstanding this warranty to pay for any special charges for ware-

*Page-number appearing at foot of page of original certified Transcript of Record.

house rent, reshipping or forwarding for which they would otherwise be liable.

V.

That the said steamer "Pleiades" departed on her voyage in said policy mentioned with said six thousand (6,000) cases of high explosives on board thereof, and while on said voyage said vessel was on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss. That thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo, but the said vessel was then and there in such damaged condition that she was unable to proceed upon her said [2] voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters.

VI.

That the said plaintiff had prepaid the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa in the sum of Four Thousand Nine Hundred and Fifty (4,950) Dollars, and that in said contract of carriage it was, among other things, provided that said freight was to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the contingencies in said contract of carriage mentioned, carriers were to have the right to forward the said cargo to the port of destination on their own routes, and should receive extra compensation for said services whether performed by their own vessels or those of strangers.

That among the contingencies so provided in said bill of lading were stranding, straining and any accidents or perils of the seas.

VII.

That the said cargo was reshipped and forwarded on the steamer "Mackinaw," belonging to said carrier, and transported therein from the port of San Francisco to the port of Balboa, for which service the said plaintiff was then and there compelled to and did pay additional freight in the sum of $4,050.00.

VIII.

That the said plaintiff demanded payment of the said insurance company of the said sum so paid to forward said cargo to said port of destination, but said defendant has refused to pay the same, or any part thereof, and no part thereof has been paid; [3]

AND FOR A FURTHER AND SECOND CAUSE OF ACTION AGAINST SAID DEFENDANT, SAID PLAINTIFF ALLEGES:

I.

That at all the times hereinafter mentioned the said Trojan Powder Company, plaintiff above named, was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of New York, having its principal place of business at the City of New York, in said State, and at all of said times was, and still is, a citizen of said State of New York.

II.

That at all the times hereinafter mentioned the Fireman's Fund Insurance Company, defendant above named, was, and still is, a corporation organ-

ized and existing under and by virtue of the laws of the State of California, having its principal place of business at the City and County of San Francisco, in said State, and at all of said times was, and still is, a citizen of the State of California.

III.

That heretofore, to wit, on the 7th day of August, 1912, the said Fireman's Fund Insurance Company did make, issue and deliver unto the said Trojan Powder Company its certain policy of marine insurance, wherein and whereby the said Fireman's Fund Insurance Company did insure the said Trojan Powder Company in the sum of Thirty-five Thousand (35,000) Dollars, on six thousand (6,000) cases of high explosives laden on board the ship or vessel called the "Pleiades," for a voyage from the Bay of San Francisco, in the State of California, to the port of Balboa, Isthmus of Panama.

IV.

That it was provided in said policy that the adventures and perils which the said Company is content to bear and does take upon [4] itself in the voyage so insured as aforesaid, were, among other things, perils of the seas, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the subject-matter of this insurance, or any part thereof.

That it was further in and by said policy provided that said goods were warranted free from average unless general, or the ship or craft be stranded, sunk or burnt, each craft or lighter being deemed a separate insurance. Underwriters notwithstanding this,

warranty to pay for any special charges for warehouse rent, reshipping or forwarding for which they would otherwise be liable.

That it was among other things in said policy provided that all questions of liability arising under its policy are to be governed by the laws and customs of England.

V.

That it is the law of England that if by reason of damage done to the ship, she cannot be repaired without very great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination; that there is and can be no absolute obligation on the part of the master towards the owner of the goods to forward them in the original vessel.

VI.

That it is the law of England that where freight is paid in advance, and the contract of carriage provides that it is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, such freight is earned by the shipowner when the cargo is received on board; and the right of the shipowner thereto does not depend on the delivery of the cargo at the port of destination.

VII.

It is further the law of England that, in a case of marine insurance on merchandise, when, in consequence of a peril insured [5] against, an extra freight must be paid by the cargo owner to bring the said merchandise to the port of destination, such expense is a loss directly due to such peril insured

against for which the insurer is liable.

VIII.

That the said steamer "Pleiades" departed on her voyage in said policy mentioned, with said six thousand (6,000) cases of high explosives on board thereof, and while on said voyage was on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss. That thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo, but the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters. That the repairs on said steamer were not completed until———. That the nature of said goods and the purpose for which said goods were intended, would have rendered it unreasonable to detain them until the completion of said repairs.

IX.

That said cargo was being transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company, wherein and whereby it is provided that said freight, whether prepaid or to be collected, was to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the contingencies in said contract of carriage mentioned, carriers were to have the right to forward the said cargo to the port of destination on their own

routes, and should receive extra compensation for said service, whether performed by their own vessels, or those of strangers. [6]

That among the contingencies so provided in said bill of lading, were stranding, straining and any accidents or perils of the seas.

That the said plaintiff had prepaid the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa, in the sum of Four Thousand Nine Hundred and Fifty (4,950) Dollars.

X.

That the said cargo was on the 15th day of October, 1912, reshipped and forwarded on the steamer "Mackinaw," belonging to said California-Atlantic Steamship Company, and transported therein from the port of San Francisco to the port of Balboa, for which service the said plaintiff was then and there compelled to, and did pay additional freight in the sum of $4,050.00.

XI.

That said plaintiff has demanded payment of the said Insurance Company of the said sum so paid to forward said cargo to said port of destination, but the said defendant has refused to pay the same, or any part thereof, and no part thereof has been paid.

AND FOR A FURTHER, AND THIRD CAUSE OF ACTION AGAINST SAID DEFENDANT, SAID PLAINTIFF ALLEGES:

I.

That at all the times hereinafter mentioned the Trojan Powder Company, plaintiff above named, was, and still is, a corporation, organized and exist-

ing under and by virtue of the laws of the State of New York, having its principal place of business in the City of New York, in said State, and at all of said times was, and still is, a citizen of said State of New York.

II.

That at all the times hereinafter mentioned the Fireman's Fund [7] Insurance Company was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of California having its principal place of business at the City and County of San Francisco, in said State, and at all of said times was, and still is, a citizen of said State of California.

III.

That heretofore, to wit, on the 7th day of August, 1912, the said Fireman's Fund Insurance Company did make, issue and deliver unto the said Trojan Powder Company its certain policy of marine insurance wherein and whereby the said Fireman's Fund Insurance did insure the said Trojan Powder Company in the sum of Thirty-five Thousand (35,000) Dollars, on six thousand cases of high explosives laden on board the ship or vessel called the "Pleiades," for a voyage from the Bay of San Francisco to the port of Balboa, Isthmus of Panama.

IV.

That it was provided in said policy that the adventures and perils which the said company is content to bear and does take upon itself in the voyage so insured as aforesaid, were, among other things, perils of the seas, and all other perils, losses and misfor-

tunes which have or shall come to the hurt, detriment or damage of the subject-matter of this insurance, or any part thereof.

That it was, among other things, in said policy provided that all questions of liability arising under its policy are to be governed by the laws and customs of England.

V.

That the said steamer "Pleiades" departed on her voyage in said policy mentioned with six thousand (6,000) cases of high explosives on board thereof, and while on said voyage was on the 16th day of August, 1912, stranded off the coast of Mexico, and [8] *and* then and there together with her cargo was in danger of becoming a total loss. That thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo, but the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters. That the repairs on said steamer were not completed until ———. That the nature of said goods and purpose for which said goods were intended, would have rendered it unreasonable to detain them until the completion of said repairs.

VI.

That said cargo was being transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company, wherein and whereby it was provided that freight, whether

prepaid or to be collected, was to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the contingencies in said contract of carriage mentioned, said carriers were to have the right to forward said cargo to the port of destination on their own routes, and should receive extra compensation for said service, whether performed by their own vessels or those of strangers.

That among the contingencies so provided in said bill of lading, was stranding, straining and any accidents or perils of the seas.

That the said plaintiff had prepaid the freight for the carriage of said cargo from the port of San Francisco to Balboa in the sum of Four Thousand Nine Hundred and Fifty (4,950) Dollars.

VII.

That the said cargo was on the 15th day of October, 1912, reshipped and forwarded on the steamer "Mackinaw" belonging to said [9] California-Atlantic Steamship Company, and transported therein from the port of San Francisco to the port of Balboa, for which service the said plaintiff was then and there compelled to and did pay additional freight in the sum of $4,050.00.

VIII.

That under a policy and contract of carriage such as that hereinbefore set forth, and under such facts as those hereinbefore set forth, it is the practice and custom of Underwriters in England to pay the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight

originally paid, as a loss directly due to said peril.

IX.

That said plaintiff has demanded payment of the said Insurance Company of the said sum so paid to forward said cargo to said port of destination, but said defendant has refused to pay the same, or any part thereof, and no part thereof has been paid.

AND FOR A FURTHER AND FOURTH CAUSE OF ACTION AGAINST SAID DEFENDANT, SAID PLAINTIFF ALLEGES:

I.

That at all the times hereinafter mentioned the said Trojan Powder Company was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of New York, having its principal place of business at the City of New York, in said State, and at all of said times was, and still is, a citizen of said State of New York.

II.

That at all the times hereinafter mentioned, the Fireman's Fund Insurance Company, defendant named, was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of California, having its principal place of business [10] at the City and County of San Francisco, in said State, and at all of said times was, and still is, a citizen of said State of California.

III.

That heretofore, to wit, on the 7th day of August, 1912, the said Fireman's Fund Insurance Company did make, issue and deliver unto the said Trojan Powder Company its certain policy of marine insur-

ance, wherein and whereby the said Fireman's Fund Insurance Company did insure the said Trojan Powder Company in the sum of Thirty-five Thousand (35,000) Dollars on six thousand (6,000) cases of high explosives laden on board the ship or vessel called the "Pleiades," for a voyage from the Bay of San Francisco to the port of Balboa, Isthmus of Panama.

IV.

That it was provided in said policy that the adventures and perils which the said Company is content to bear and does take upon itself in the voyage so insured as aforesaid were, among other *other* things, perils of the seas, and all other perils, losses and misfortunes which have or shall come to the hurt, detriment or damage of the subject matter of this insurance, or any part thereof.

That it was among other things in said policy provided that in case of loss or misfortune it shall be lawful to the insured, their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the aforesaid subject matter of this insurance, or any part thereof, without prejudice to this insurance, the charges whereof the said Company will bear in proportion to the sum hereby insured. That said goods were insured up to their full value.

V.

That the said steamer "Pleiades" departed on her said voyage [11] in said policy mentioned, with said six thousand (6,000) cases of high explosives on board thereof, and while on said voyage was on

the 16th day of August, 1912, stranded off the coast of Mexico and then and there, together with her cargo, was in danger of becoming a total loss. That thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo, but the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters. That the repairs on said steamer were not completed until ———. That said goods were then and there in danger of loss and deterioration, if detained at the port of repair.

VI.

That in order to transport the said cargo to its port of destination, the said plaintiff was compelled to and did ship the same on the steamer "Mackinaw" from the port of San Francisco to the port of Balboa, and the said plaintiff was then and there compelled to and did pay the sum of Four Thousand and Fifty (4,050) Dollars additional freight for the carriage aforesaid.

VII.

That said cargo was being transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company, wherein and whereby it was provided that freight, whether prepaid or to be collected, was to be considered as earned vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the contingencies in said contract of

carriage mentioned, said carriers were to have the right to forward said cargo to the port of destination on their own routes, and should receive extra compensation for said service, whether performed by their own vessels, or those of strangers. [12]

That among the contingencies so provided in said bill of lading was stranding, straining and any accidents or perils of the seas.

That the said plaintiff had prepared the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa, in the sum of Four Thousand Nine Hundred and Fifty (4,950) Dollars.

VIII.

That the said plaintiff demanded payment of the said Insurance Company of the said sum so paid to forward said cargo to said port of destination, but said defendant has refused to pay the same, or any part thereof, and no part thereof has been paid.

WHEREFORE, plaintiff prays for judgment against said defendant in the sum of Four Thousand and Fifty (4,050) Dollars, together with interest from the 15th day of October, 1912, and costs of suit.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

W. P. Mulhern being duly sworn, deposes and says: That he is an officer of Trojan Powder Company, a corporation, plaintiff in the above-entitled cause, to wit, the Manager thereof; that he has read the foregoing Complaint, and knows the contents

thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and that as to those matters he believes it to be true.

W. P. MULHERN.

Subscribed and sworn to before me this 27th day of May, 1913.

[Seal] CHARLES EDELMAN,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 9th, 1914. [13]

[Endorsed]: Filed May 27, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation, Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Defendant.

Answer.

Comes now the Fireman's Fund Insurance Company, a corporation, and in answer to the allegations of the first cause of action in the complaint herein admits, denies and alleges, as follows:

I.

Defendant admits the allegations of paragraph I of said first cause of action.

II.

Defendant admits the allegations of paragraph II of said first cause of action.

III.

Defendant admits the allegations of paragraph III of said first cause of action.

IV.

Defendant admits the allegations of paragraph IV of said first cause of action.

V.

Defendant admits the allegations of paragraph V of said first cause of action. [15]

VI.

Answering unto the allegations of paragraph VI of said first cause of action, defendant alleges that it has no information or belief as to the same sufficient to enable it to answer said allegations, and placing its denial on that ground, denies that said plaintiff had prepaid the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa in the sum of $4,950, or in any sum whatsoever, or at all, and that in said contract of carriage it was, among other things, or at all, provided that said freight was to be considered as earned, vessel or goods lost, or not lost, at any stage of the entire transit, and denies that the said plaintiff had prepared the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa in the sum of $4,950, or in any sum whatsoever, or at all,

or that in the said contract of carriage it was, among other things, or at all, provided that the said freight was to be considered as earned, vessel or goods lost, or not lost, at any stage of the entire transit. Defendant, on the same ground, further denies that on the happening of any of the contingencies in said contract mentioned, or on any other contingency, or at all, in said contract of carriage, the carriers were to have the right to forward the said cargo to the port of destination on their own routes, and should receive such extra compensation for said service, whether performed by their own vessels, or those of strangers, and denies that on the happening of any of the contingencies in said contract mentioned, or on any other contingency, or at all, carriers were to have the right to forward the said cargo to the port of destination on their own routes, or should receive extra compensation for said service, whether performed by their own vessels or those [16] of strangers. Defendant, on the same ground, further denies that, among the contingencies so provided in said contract were stranding or straining or any of the accidents or perils of the sea, or stranding or straining or any of the accidents or perils of the seas.

VII.

Answering unto the allegations of paragraph VII of said first cause of action, defendant admits that it is informed that said cargo was reshipped and forwarded on the steamer "Mackinaw," belonging to said carrier, and transported therein from the port of San Francisco to the port of Balboa. Defendant alleges that it has no information or belief as to that

portion of said paragraph alleging

> "for which service the plaintiff was then and there compelled to, and did, pay additional freight in the sum of $4050,"

and placing its denial on that ground, denies that said plaintiff was then and there, or then or there, compelled to, and did, pay additional freight in the sum of $4,050, or in any sum whatsoever, or at all, for said transportation of said cargo from the port of San Francisco to the port of Balboa; and denies that said plaintiff was then and there, or then or there, compelled to, or did, pay additional freight in the sum of $4,050, or in any sum whatsoever, or at all, for said service.

VIII.

Answering unto the allegations of paragraph VIII of said first cause of action, defendant alleges that it has no information or belief as to whether said sum of $4,050 was paid to forward said cargo to the port of destination, and placing its denial on that ground, denies that said sum of $4,050 was paid to forward said cargo to destination; it admits, however, that plaintiff demanded payment [17] of defendant of the said sum so alleged to have been paid to forward said cargo to said port of destination, and that defendant has refused to pay the same, or any part thereor, and that no part of same has been paid.

In answer to the allegations contained in the second cause of action in the complaint herein, defendant admits, denies and alleges, as follows:

I.

Defendant admits the allegations of paragraph I

of said second cause of action.

II.

Defendant admits the allegations of paragraph II of said second cause of action.

III.

Defendant admits the allegations of paragraph III of said second cause of action.

IV.

Defendant admits the allegations of paragraph IV of said second cause of action.

V.

Answering unto the allegations of paragraph V of said second cause of action, defendant admits that it is the law of England that if by reason of damage done to a ship she cannot be repaired without a very great loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination. Defendant denies that there is, and can be, no absolute obligation on the part of the master toward the owner of the goods to forward them in the original vessel, and denies that there is, or can be, no absolute obligation on the part of the master toward the owner of the goods to forward them in [18] the original vessel.

VI.

Answering unto the allegations of paragraph VI of said second cause of action, defendant denies that it is the law of England that where freight is paid in advance and the contract of carriage provided, or the contract of carriage provided, that it is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, such freight is

earned by the ship-owner when the cargo is received on board, and that the right of the shipowner thereto, or that the right *or* the shipowner thereto, does not depend on the delivery of the cargo at the port of destination. Defendant admits, however, that the right of the shipowner to prepaid freight does not depend on the delivery of the cargo at the port of destination. And in that behalf alleges that the payment of freight in advance does not relieve the shipowner from his obligation of exercising due diligence to carry the cargo so paid for forward to destination, and that freight paid in advance is not earned if the vessel or goods be lost by any negligence for which the shipowner is responsible.

VII.

Answering unto the allegations of paragraph VII of said second cause of action, defendant denies that it is further, or at all, the law of England that in case of marine insurance on merchandise when in consequence of a peril insured against, an extra, or any, freight must be paid by the cargo owner to bring said merchandise to the port of destination, such expense is a loss directly, or otherwise, or at all, due to such peril insured against for which the insurer is liable.

VIII.

Answering unto the allegations of paragraph VIII of [19] said second cause of action, defendant admits that said steamer "Pleiades" departed on her voyage in the said policy mentioned with said 6,000 cases of high explosives on board, and while on said voyage was, on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there,

together with her cargo, was in danger of becoming a total loss; that thereafter, such salvage operations were undertaken as resulted in the floating and saving of said vessel, and her cargo, but that the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where said cargo was discharged into lighters. Defendant admits that the repairs on said vessel were not completed until ———. Defendant denies that the nature of said goods, and the purpose for which said goods were intended would have rendered it unreasonable to have detained them until completion of said repairs, and denies that the nature of said goods, or the purpose for which said goods were intended, or any other reason whatsoever, would have rendered it unreasonable to detain them until the completion of said repairs.

IX.

Answering unto the allegations of paragraph IX of said second cause of action, defendant alleges that it has no information or belief as to the allegations contained in said paragraph IX, and placing its denial on that ground, denies that said cargo was being transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company wherein and whereby, or wherein or whereby, it is provided that said freight, whether prepaid or to be collected, was to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit; and on the same ground denies that such cargo was to be transported [20]

in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company providing that on the happening of any of the contingencies in said contract of carriage mentioned, or for any other reason, or at all, carriers were to have the right to forward the said cargo to the port of destination on their own routes, and should receive extra compensation for such service, whether performed by their own vessels or those of strangers, or for any other reason, or at all; and denies that on the happening of any of the contingencies in said contract of carriage mentioned, or for any other reason, or at all, carriers were to have the right to forward the said cargo to the port of destination on their own routes, or should receive extra compensation for said service, whether performed by their own vessels or those of strangers, or for any other reason or at all.

Defendant, on the same ground, further denies that among the contingencies so provided in said bill of lading were stranding, straining or any accidents or perils of the seas, or stranding or straining or any accidents or perils of the seas.

Defendant, on the same ground, further denies that the said plaintiff had prepaid the freight for the carriage of such cargo from the port of San Francisco to the port of Balboa in the sum of $4,950, or in any sum whatsoever, or at all.

X.

Answering unto the allegations of paragraph X of said second cause of action, defendant admits that it is informed that said cargo was, on the 15th day

of October, 1912, reshipped and forwarded on the steamer "Mackinaw," belonging to said California-Atlantic Steamship Company, and transported therein from the port of San Francisco to the port of Balboa. Defendant alleges that it has no information or belief as to that portion of said paragraph alleging [21]

> "for which service the said plaintiff was then and there compelled to, and did, pay additional freight in the sum of $4050,"

and placing its denial on that ground, denies that said plaintiff was then and there compelled to, and did, pay additional freight in the sum of $4,050, or in any sum whatsoever, or at all, for said transportation of said cargo from the port of San Francisco to the port of Balboa, and denies that said plaintiff was then and there, or then or there, compelled to, or did, pay additional freight in the sum of $4,050, or in any sum whatsoever, or at all, for said service.

XI.

Answering unto the allegations of paragraph XI of said second cause of action, defendant alleges that it has no information or belief as to whether said sum of $4,050 was paid to forward said cargo to the port of destination, and placing its denial on that ground, denies that said sum of $4,050, or any sum, was paid to forward said cargo to destination; it admits, however, that plaintiff demanded payment of defendant of the said sum so alleged to have been paid to forward said cargo to said port of destination, and that defendant has refused to pay the same,

or any part thereof, and that no part of same has been paid.

In answer to the allegations contained in the third cause of action in the complaint herein, defendant admits, denies and alleges, as follows:

I.

Defendant admits the allegations of paragraph I of said third cause of action.

II.

Defendant admits the allegations of paragraph II of said third cause of action. [22]

III.

Defendant admits the allegations of paragraph III of said third cause of action.

IV.

Defendant admits the allegations of paragraph IV of said third cause of action.

V.

Answering unto the allegations of paragraph V of said third cause of action, defendant admits that said steamer "Pleiades" departed on her voyage in the said policy mentioned with said 6,000 cases of high explosives on board, and while on said voyage was, on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss; that thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel, and her cargo, but that the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where

said cargo was discharged into lighters. Defendant admits that the repairs on said vessel were not completed until ——. Defendant denies that the nature of the said goods, and the purpose for which said goods were intended would have rendered it unreasonable to have detained them until completion of said repairs, and denies that the nature of said goods, or the purpose for which said goods were intended, or any other reason whatsoever, would have rendered it unreasonable to detain them until the completion of said repairs.

VI.

Answering unto the allegations of paragraph VI of said third cause of action, defendant alleges that it has no information or belief as to the allegations contained in said paragraph VI, and [23] placing its denial on that ground, denies that said cargo was being transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company wherein and whereby, or wherein or whereby, it is provided that said freight, whether prepaid or to be collected, was to be considered as earned, vessel or goods lost or not lost, at any stage of the entire transit; and on the same ground denies that such cargo was to be transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company providing that on the happening of any of the contingencies in said contract of carriage mentioned, or for any other reason, or at all, said carriers were to have the right to forward said cargo to the port of destination on their own routes, and

should receive extra compensation for such service, whether performed by their own vessels or those of strangers, or for any other reason, or at all; and denies that on the happening of any of the contingencies in said contract of carriage mentioned, or for any other reason, or at all, carriers were to have the right to forward the said cargo to the port of destination on their own routes, or should receive extra compensation for said service, whether performed by their own vessels or those of strangers, or for any other reason, or at all.

Defendant, on the same ground, further denies that among the contingencies so provided in said bill of lading were stranding, straining or any accidents or perils of the seas, or stranding or straining or any accidents or perils of the seas.

Defendant, on the same ground, further denies that the said plaintiff had prepaid the freight for the carriage of such cargo from the port of San Francisco to the port of Balboa in the sum of $4,950, or in any sum whatsoever, or at all.

VII.

Answering unto the allegations of paragraph VII of said [24] third cause of action, defendant admits that it is informed that said cargo was, on the 15th day of October, 1912, reshipped and forwarded on the steamer "Mackinaw," belonging to the said California-Atlantic Steamship Company, and transported therein from the port of San Francisco to the port of Balboa. Defendant alleges that it has no information or belief as to that portion of said paragraph alleging

"for which service the said plaintiff was then and there compelled to, and did, pay additional freight in the sum of $4,050."

and placing its denial on that ground, denies that said plaintiff was then and there compelled to, and did, pay additional freight in the sum of $4,050, or in any sum whatsoever, or at all, for said transportation of said cargo from the port of San Francisco to the port of Balboa, and denies that said plaintiff was then and there, or then or there, compelled to, or did, pay additional freight in the sum of $4,050, or in any sum whatsoever, or at all, for said service.

VIII.

Answering unto the allegations of paragraph VIII of said third cause of action, defendant denies that under a policy and contract of carriage, such as that thereinbefore in said second cause of action set forth, and under such facts as those thereinbefore in said second cause of action set forth, and under such facts as those thereinbefore in said second cause of action set forth, it is the practice and custom of underwriters in England to pay the excess of the expense, or any expense, or at all, to which the owner of the goods is put in bringing them to their destination over the freight originally paid, as a loss directly, or indirectly, or at all, due to said peril, or otherwise, or at all; and denies that under a policy or contract of carriage such as that thereinbefore set forth in said second cause of action, or under such facts, as those thereinbefore in said second cause of action set forth, it is the practice and custom, or practice [25] or custom, of underwriters in England to pay

the excess of the expense, or any expense, or at all, to which the owner of the goods is put to bring them to their destination over the freight originally paid, as a loss directly or indirectly, or at all, due to said peril, or otherwise, or at all.

IX.

Answering unto the allegations of paragraph IX of said third cause of action, defendant alleges that it has no information or belief as to whether said sum of $4,050 was paid to forward said cargo to the port of destination, and placing its denial on that ground, denies that said sum of $4,050 was paid to forward said cargo to destination; it admits, however, that plaintiff demanded payment of defendant of the said sum so alleged to have been paid to forward said cargo to said port of destination, and that defendant has refused to pay the same, or any part thereof, and that no part of same has been paid.

In answer to the allegations contained in the fourth cause of action in the complaint herein, defendant admits, denies and alleges, as follows:

I.

Defendant admits the allegations of paragraph I of said fourth cause of action.

II.

Defendant admits the allegations of paragraph II of said fourth cause of action.

III.

Defendant admits the allegations of paragraph III of said fourth cause of action.

IV.

Defendant admits the allegations of paragraph

IV of said fourth cause of action. [26]

V.

Answering unto the allegations of paragraph V of said fourth cause of action, defendant admits that said steamer "Pleiades" departed on her voyage in said policy mentioned with said 6,000 cases of high explosives on board, and while on said voyage was, on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss; that thereafter, such salvage operations were undertaken as resulted in the floating and saving of said vessel, and her cargo, but that the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where said cargo was discharged into lighters. Defendant admits that the repairs on said vessel were not completed until ———. Defendant denies that said goods were then and there in danger of loss and deterioration if detained at the port of repair, and denies that said goods were then or there in danger of loss and deterioration, or in danger of loss or deterioration if detained at the port of repair, or in danger of any loss of any kind whatsoever, or at any place whatsoever, or at any time whatsoever, or otherwise, or at all.

VI.

Answering unto the allegations of paragraph VI of said fourth cause of action, defendant denies that in order to transport said cargo to its port of destination that said plaintiff was compelled to, and did,

or was compelled to, or did, ship the same on the steamer "Mackinaw" from the port of San Francisco to the port of Balboa. Defendant alleges that it has no information or belief sufficient to enable it to answer the remaining allegations of said paragraph, and placing its denial upon that ground, [27] denies that plaintiff was then and there, or then or there compelled and did, or did, pay the sum of $4,050, or any sum whatever, or at all, additional freight for the carriage alleged in said paragraph, and, on the same ground, further denies that in order to transport the said cargo to its port of destination said plaintiff was compelled to, and did, or did, ship the same on the steamer "Mackinaw" from the port of San Francisco to the port of Balboa, and that said plaintiff was then and there, or then or there, compelled to, and did, or did, pay the sum of $4,050, or any sum whatsoever, or at all, additional freight for the carriage aforesaid, and denies that in order to transport the said cargo to its port of destination that said plaintiff was compelled to, and did, or did, ship the same on the steamer "Mackinaw" from the port of San Francisco to the port of Balboa, or that the said plaintiff was then and there, or then or there, compelled to, and did, pay, or did pay, the sum of $4,050, or any sum whatsoever, or at all, additional freight for the carriage aforesaid.

VII.

Answering unto the allegations of paragraph VII of said fourth cause of action, defendant alleges that it has no information or belief as to the allegations contained in said paragraph sufficient to enable it to

answer the same, and placing its denial on that ground, denies that said cargo was being transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company wherein and whereby, or wherein or whereby, it was provided that freight, whether prepaid or to be collected, was to be considered as earned, vessel or goods lost or not lost, at any stage of the entire transit; and on the same ground denies that such cargo was to be transported in said steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company, providing that on the happening of any [28] of the contingencies in said contract mentioned, or for any other reason, or at all, said carriers were to have the right to forward said cargo to the port of destination on their own routes, but should receive extra compensation for such service, whether performed by their own vessels or those of strangers, or for any other reason, or at all; and denies that on the happening of any of the contingencies in said contract or carriage mentioned, or for any other reason, or at all, said carriers were to have the right to forward the said cargo to the port of destination on their own routes, or should receive extra compensation for such service, whether performed by their own vessels, or those of strangers, or for any other reason, or at all. Defendant, on the same ground, further denies that among the contingencies so provided in said bill of lading were stranding, straining and any accidents or perils of the seas, or stranding or straining or any accidents or

perils of the seas. Defendant, on the same ground, denies that said plaintiff had prepaid the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa in the sum of $4,050, or in any sum whatsoever, or at all.

VIII.

Answering unto the allegations of paragraph VIII of said fourth cause of action, defendant alleges that it has no information or belief as to whether said sum of $4,050 was paid to forward said cargo to the port of destination, and placing its denial on that ground, denies that said sum of $4,050, or any sum, was paid to forward said cargo to destination; it admits, however, that plaintiff demanded payment of defendant of the said sum so alleged to have been paid to forward said cargo to said port of destination, and that defendant has refused to pay the same, or any part thereof, and that no part of same has been paid. [29]

For a first and further affirmative defense to the complaint herein, and each and every of the causes of action therein set forth, defendant alleges:

I.

That defendant is, and was during all the times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, said State, and is, and was during all the said times, engaged in the business, *inter alia,* of marine insurance.

II.

That plaintiff is, and was during all the times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the City of New York, said State.

III.

That heretofore, on or about the 7th day of August, 1912, defendant issued unto plaintiff its policy of insurance Number 307,264, insuring plaintiff in the sum of Thirty-five Thousand (35,000) Dollars, on six thousand (6,000) cases of high explosives, against, *inter alia,* perils of the seas, on a voyage at and from San Francisco to Balboa, laden on the steamer "Pleiades," a copy of which policy is attached hereto, marked Exhibit "A" and hereby made a part of this answer, with the same force and effect as though the same were pleaded at length herein.

IV.

That thereafter, on the 16th day of August, 1912, while upon said voyage, said steamer "Pleiades," with said cargo on board, stranded on the coast of Mexico, and was thereafter released, and, with said cargo still on board, in sound condition, [30] returned to the port of San Francisco, where, in due course, she was fully and completely repaired of the damage caused by said stranding, and was thereafter able to complete said voyage and carry said cargo to destination.

V.

That, under the law of England, it was the obligation of the carrier, in consideration of the original

freight, whether prepaid or not, to complete said voyage with said steamer "Pleiades" upon the completion of the repairs to said steamer necessitated by said stranding, and to transport said cargo to its port of destination without requiring the payment of a second freight therefor.

VI.

That if said cargo were reshipped and forwarded on said steamer "Mackinaw" to said port of Balboa and said additional freight paid thereon, as alleged in said complaint, said reshipment and said payment of said additional freight were voluntary on the part of said plaintiff without waiting for the completion of the repairs to said steamship and were not caused by any of the perils insured against by said policy, and, by the law of England, did not constitute a loss, or charge, or liability under the terms and conditions of said policy.

For a second and further affirmative defense to the complaint herein, and to each and every of the causes of action therein set forth, defendant alleges:

I.

Defendant hereby refers to and reiterates the allegations of paragraphs I, II, III, IV and V of said first affirmative defense, and hereby makes the same a part of this second affirmative [31] defense, with the same force and effect as though pleaded at length herein.

II.

That, under the law of England, if by reason of the specific purpose for which said goods were intended, or of the contract under which said goods

were sold, said goods could not be detained at said port of San Francisco until the completion of the repairs of said steamer, and thence forwarded in said steamer to the port of destination, and if upon reshipment of said goods to destination an additional freight was paid by plaintiff, such extra freight did not constitute a loss, or charge, or liability, under said policy for the reason that it was not caused by any peril insured against by said policy.

For a third and further affirmative defense to the complaint herein, and to each and every of the causes of action therein set forth, defendant alleges:

I.

Defendant hereby refers to and reiterates the allegations of paragraphs I, II, III, IV and V of said first affirmative defense, and hereby makes the same a part of this third affirmative defense, with the same force and effect as though pleaded at length herein.

II.

That, under the law of England, if by reason of their nature, said goods could not be detained at said port of San Francisco until the completion of the repairs of said steamer, and thence transported in said steamer to the port of destination, and if upon reshipment of said goods to destination an additional freight was paid by plaintiff, such extra freight did not constitute a loss, or charge, or liability, under said policy for the reason [32] that the same, or any part thereof, was not in excess of the original freight, and the payment thereof, as an extra freight, was not due to any peril insured against by said pol-

icy, but resulted from the nature of the contract of carriage entered into with the owner or charterer of said steamer "Pleiades" by which said original freight was prepaid, and was to be considered as earned, ship or goods lost or not lost at any stage of the entire transit, against which said policy did not cover.

For a fourth and further affirmative defense to the claimant herein, and to each and every of the causes of action therein set forth, defendant alleges:

I.

Defendant hereby refers to and reiterates the allegations of paragraphs I, II, III, IV and V of said first affirmative defense, and hereby makes the same a part of this fourth affirmative defense, with the same force and effect as though pleaded at length herein.

II.

That, under the law of England, if, by reason of the nature of, or purpose for which, said goods was intended, or by reason of the contract under which said goods were sold, said goods could not be detained at the port of San Francisco until the completion of repairs of said steamer "Pleiades," and hence transported in said steamer to the port of destination, such facts were not disclosed by plaintiff to defendant, and if by reason of said reshipment and payment of extra freight, a charge was incurred, or loss suffered, which was covered by said policy, the failure and neglect of plaintiff to disclose said facts to defendant constituted the concealment of facts

material to the risk, and by reason thereof [33] said policy was voided.

WHEREFORE, defendant prays that the complaint herein may be dismissed with costs.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Defendant,

State of California,
City and County of San Francisco,—ss.

J. B. LEVISON, being first duly sworn, deposes and says:

That he is an officer, to wit, the Second Vice-president of the Fireman's Fund Insurance Company, a corporation, defendant in the above-entitled action; that he makes this verification and affidavit on behalf of said corporation; that he had read the foregoing answer and is familiar with the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

J. B. LEVISON.

Subscribed and sworn to before me this 1st day of November, 1913.

[Seal] JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California. [34]

Exhibit "A" to Answer—Policy of Insurance, August 7, 1912, on Steamer "Pleiades."

DUPLICATE

CARGO—ENGLISH FORM

FIREMAN'S FUND INSURANCE COMPANY

SAN FRANCISCO, CALIFORNIA

All Policies issued abroad and made payable in the United Kingdom are required by law to have a Government Stamp of one penny per £100 affixed within ten days after date of receipt in the United Kingdom.

No. 307264

£ $35,000

Warrantad free of capture, seizure and detention and the consequences thereof or of any attempt thereat piracy excepted and also from all consequences of riots, civil commotions, hostilities or warlike operations, whether before or after declaration of war.

It is hereby agreed that the rights of the assured shall not be prejudiced by the insertion in the bill of lading of the London conference rules of affreightment 1893, or of the followiug clause:

"The act of God, perils of the sea, fire, barratry of the master and craw, enemies, pirates, thieves, arrest, and restraint of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master mariners, or other servants of the shipowners."

Warranted free from average unless general or the ship or craft be stranded, sunk or burnt, each craft or lighter being deemed a separate insurance.

Underwriters notwithstanding this warrenty to pay for any damage caused by fire or by collision with any other ship or vessel or with ice or with any substance other than water and any special charges for warehouse rent, reshipping or forwarding for which they would otherwise be liable, also to pay the insured value of any package or packages which may be totally lost in trans-shipment.

WHEREAS it hath been proposed to the FIREMAN'S FUND INSURANCE COMPANY by Trojan Powder Co.

as well in his or their own name as for and in the name and names of all and every other person or persons, to whom the subject matter of this policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described.

Now this Policy Witnesseth that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of One Hundred & Seventy-Five and 00/100ths.....DOLLARS as a premium at and after the rate of ½% per cent for such Insurance the said Company takes upon itself the burthen of such Insurance to the amount of Thirty-Five Thousand and 00/100.....DOLLARS

and promises and agrees with the insured their Executors, Administrators and Assigns in all respects truly to perform and fulfill the Contract contained in this Policy. AND it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from San Francisco Bay to Balboa.

AND it is also agreed and declared that the subject matter of this Policy as between the Assured and the said Company so far as concerns this Policy shall be and is as follows upon $35,000—on 6000 cases High explosives.

laden (under deck) on board the Ship or vessel called the Str. "Pleiades"

General average payable as per Foreign Statement or per York-Antwerp Rules of 1890 if in accordance with the Contract of Affreightment Warranted that should the vessel ground within the limits of the Columbia and/or Willamette and/or Fraser Rivers and/or Suez Canal and/or Manchester Ship Canal or its connections and/or in the River Mersey above Rock Ferry Slip, such grounding not to be deemed a stranding, but Underwriters to pay for any damage which may be proved to have directly resulted therefrom.

In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage. Including risk of craft and boats to and from the ship or vessel each craft or boat to be deemed a separate risk.

All questions of liability arising under this policy are to be governed by the laws and customs of England. This Policy is issued in duplicate. Freight warranted free from any claim consequent upon loss of time whether arising from a peril of the sea or otherwise.

The preceding clauses and all clauses annexed hereto or stamped hereon shall control other printed conditions inconsistent with the same.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Freight Goods and Merchandise from the time when the Goods and Merchandise shall be laden on board the said Ship or Vessel Craft or Boat *as above* and continue until the said Goods and Merchandise be discharged and safely landed at *as above* AND that it shall be lawful for the said Ship or Vessel in the Voyage so insured as aforesaid to proceed and sail to and touch and stay at any Ports or Places whatsoever without prejudice to this Insurance AND touching the Adventures and Perils which the said Company is content to bear and does take upon itself in the Voyage so Insured as aforesaid they are of the Seas Men-of-War Fire Enemies Pirates Rovers Thieves Jettisons Letters of Mart and Counter Mart Surprisals Takings at Sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality soever Barratry of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof AND in case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labour and travel for in and about the Defence Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance the charges whereof the said Company will bear in proportion to the sum hereby insured AND (it is expressly declared and agreed that the acts of Insurer or Insured in Recovering Saving or Preserving the Property Insured shall not be considered a waiver or acceptance of abandonment) AND it is declared and agreed that Corn Fish Salt Saltpetre Fruit Flour Rice Seeds Hides Skins and *Molasses* ——— shall be and are warranted free from average unless general or the Ship be stranded sunk or burnt or unless caused by collision with any other Ship or Vessel and that Sugar Tobacco Hemp and Flax shall be and are warranted free from average under Five Pounds per centum and that all other Goods and also Ship and Freight shall be and are warranted free from average under Three Pounds per centum unless general or the Ship be stranded sunk or burnt.

It is hereby understood and agreed that in case of claim for loss or damage to the interest insured under this policy same shall be reported as soon as goods are landed or loss known to Joseph Hadley Esq. No. 1 Cornhill E. C. London or Messrs. Brodrick Leitch & Kendall No. B 18 Liverpool and London Chambers Liverpool; and that all claims hereunder shall be paid at the office of this Company in San Francisco or at the office of Messrs. Brown Shipley & Company London upon certificate of loss signed by Joseph Hadley Esq. or Messrs. Brodrick Leitch & Kendall.

In Witness Whereof the FIREMAN'S FUND INSURANCE COMPANY has caused these presents to be signed by its duly authorized officers

in the City of San Francisco, State of California, this ——— day of ——— one thousand nine hundred and ———

Not valid unless countersigned by GEORGE E. BILLINGS, Marine Agent.

A. M. FOLLANSBEE, Jr.,
Marine Secretary.

WM. J. DUTTON,
President.

Countersigned August 7, 1912. ....., Marine Agent.

DUPLICATE

ENGLISH CARGO

FIREMAN'S FUND INSURANCE COMPANY

—OF—

SAN FRANCISCO, CALIFORNIA

No. 307264

Date August 7, 1912.

Vessel

Str. "Pleiades"

Assured

Trojan Powder Co.

£ $35,000 *at* ½ % %

£ $1750.00

Head Office, Company's Building
California and Sansome Streets.

Service of the within answer and receipt of a copy is hereby admitted this 1st day of November, 1913.

NATHAN H. FRANK,
IRVING H. FRANK,
Attys. for Plaintiff,

[Endorsed]: Filed Nov. 1, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[36]**

In the District Court of the United States, in and for the Northern District of California, Division Two.

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Waiver.

The defendant above named hereby expressly waives a trial by jury in the above-entitled action.

McCUTCHEN, OLNEY & WILLARD,
Attorneys for Defendant.

The plaintiff also waives a jury.

NATHAN H. FRANK,
Atty. for Plff.

[Endorsed]: Filed March 2d, 1914. Walter B. Maling, Clerk. **[37]**

At a stated term, to wit; the March term A. D. 1914 of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the Court-room in the city and county of San Francisco, on Tuesday the 26th day of May in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,660.

TROJAN POWDER CO.,

vs.

FIREMAN'S FUND INSURANCE CO.

Minutes of Court—May 26, 1914—Order Discharging Jury.

The parties being present as heretofore and the jury heretofore impaneled also being present, thereupon the trial was resumed and by stipulation of counsel for both sides in open Court, the jury was discharged from further consideration herein and the trial proceeded with before the Court sitting without a jury. [38]

At a stated term, to wit; the March term A. D. 1914 of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the Court-room in the city and county of San Francisco, on Monday the 29th day of June in the year of

our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,660.

TROJAN POWDER CO.,

vs.

FIREMAN'S FUND INSURANCE CO.

Minutes of Court—June 29, 1914—Order for Judgment.

This cause heretofore tried and submitted being now fully considered and the Court having rendered its oral opinion, it was ordered that judgment be entered in favor of plaintiff and against defendant as prayed on special findings to be prepared and filed. [39]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Findings of Fact and Conclusions of Law.

This cause coming on for trial, and having been tried before the Court, a jury trial having been

waived by the parties, Nathan H. Frank appearing for the plaintiff, and Ira A. Campbell appearing for the defendant, and having heard the allegations and proofs of the parties, and the argument of counsel, and being advised in the premises, I hereby make and file the following Findings of Fact and Conclusions of Law constituting my decision in the said action.

FINDINGS OF FACT.

1. That the said cargo was being transported in the said steamer "Pleiades" under a contract of carriage with the California Atlantic Steamship Company, wherein and whereby it was provided that freight, whether prepaid or to be collected, was to be considered as earned vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the contingencies in said contract of carriage mentioned, said carriers were to have the right to forward said cargo to the port of destination on their own ships, and should receive extra compensation for such service, whether performed by their own vessels or those of strangers; that among the contingencies so provided in said bill of lading were, stranding, straining, and any accidents or perils of the [40] sea. That the said plaintiff had prepaid the freight for the carriage of said cargo from the port of San Francisco to the port of Balboa, in the sum of Four Thousand Nine Hundred and Fifty ($4,950) Dollars.

2. That said steamer "Pleiades" departed on her voyage in said policy mentioned, with said 6,000 cases of high explosives on board thereof, and while

on said voyage, was on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss; that the said plaintiff then and there abandoned said cargo to said defendant, which abandonment said defendant then and there refused to accept; that thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo; that the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters; that the said repairs on said vessel were not completed until December 27, 1912, and said steamer never resumed or otherwise performed said voyage, but said voyage was wholly abandoned by said steamer; that the nature of said goods, and the purpose for which said goods were intended, would have rendered it unreasonable to detain them until the completion of repairs.

3. That in order to transport the said cargo to its port of destination, the said plaintiff was compelled to, and did, on the 15th day of October, 1912, reship and forward the said cargo on the steamer "Mackinaw" belonging to the said carrier California Atlantic Steamship Company, and transported said cargo therein from the port of San Francisco to the port of Balboa, for which service the said plaintiff was then and there compelled to, and did, pay additional freight in the sum of Four Thousand Fifty ($4,050) Dollars. **[41]**

4. That the said plaintiff demanded payment of the said insurance company of the said sum so paid by it to forward the said cargo to said port of destination, but said defendant has refused to pay the same, or any part thereof, and no part thereof has been paid.

5. That it is the law of England that if, by reason of damage done to the ship, she cannot be repaired without great loss of time, the master is at liberty to procure another ship to transport the cargo to the port of destination; that there is no absolute obligation on the part of the master towards the owner of the goods to forward them in the original ship.

6. That it is the law of England that where freight is paid in advance, and the contract provides that it is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, such freight is earned by the ship owner when the cargo is received on board, and the right of the ship owner thereto does not depend on the delivery of the cargo at the port of destination.

7. That it is the law of England, that in case of marine insurance on merchandise, when, in consequence of a peril insured against, an extra freight must be paid by the cargo owner to bring said merchandise to the port of destination, such expense is a loss directly due to such peril insured against for which the insurer is liable.

8. That under the policy and the facts admitted by the pleadings in the case at bar, in connection with the facts herein found by this Court, it is the

practice and custom of underwriters in England to pay the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight originally paid, as a loss directly due to such perils.

9. That under the law of England, it was not the obligation [42] of the carrier in consideration of the original freight whether prepaid or not, to complete said voyage with said steamer "Pleiades" upon the completion of the repairs to said steamer necessitated by such stranding and to transport the said cargo to its port of destination without requiring the payment of the second freight therefor.

10. That the reshipment and forwarding of said cargo on said steamer "Mackinaw" to said port of Balboa, and the payment of additional freight, were not voluntary on the part of the said plaintiff, and were caused by perils of the sea insured against by said policy, and under the laws of England did constitute a loss, charge and liability under the terms and conditions of said policy.

11. That under the law of England, if, by reason of the specific purpose for which said goods were intended, said goods could not be detained at said port of San Francisco until the completion of the repairs of said vessel and thence forwarded in said steamer to the port of destination, and if upon reshipment of said goods to destination an additional freight was paid by plaintiff, such extra freight did constitute a loss, charge and liability under said policy, and was caused by perils insured against by said policy.

12. That under the law of England, the payment of said extra freight was due to a peril insured against by said policy, and resulted in a loss which said policy did cover.

13. That under the law of England, there was no concealment by the plaintiff from the defendant of facts material to the risk, and said policy was not voided.

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing facts, the Court finds:

1. That the defendant is indebted to the said plaintiff, and the said plaintiff is entitled to recover from the said defendant, the sum of Four Thousand and Fifty ($4,050) Dollars, together with **[43]** interest thereon from the 15th day of October, 1912.

2. That the said plaintiff is entitled to a judgment for costs against said defendant.

Judgment is hereby ordered to be entered accordingly.

Dated October 21st, 1915.

WM. C. VAN FLEET,
Judge.

Receipt of a copy of the within findings of fact and conclusions of law is hereby admitted this 28th day of June, 1915.

McCUTCHEN, OLNEY & WILLARD,
Attorneys for Defendant.

[Endorsed]: Filed October 21, 1915. Walter B. Maling, Clerk. **[44]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Judgment on Findings.

This cause having come on regularly for trial on the 22d day of May, 1914, before the Court sitting without a jury, a trial by jury having been specially waived by stipulation filed herein; Nathan H. Frank and Irving H. Frank, Esqrs., appearing as attorneys for plaintiff and Ira A. Campbell, Esq., appearing as attorney for defendant; and the trial having been proceeded with on the 26th and 27th days of May, 1914, and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation, having filed its special findings in writing, and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Trojan Powder Company, a corporation,

plaintiff, do have and recover of and from Fireman's Fund Insurance Company, a corporation, defendant, the sum of Four Thousand Nine Hundred Five and 23/100 ($4,905.23) Dollars, together with its costs herein expended taxed at $108.70.

Judgment entered October 21, 1915.

WALTER B. MALING,
Clerk.

A True Copy, Attest:

[Seal] WALTER B. MALING,
Clerk. **[45]**

[Endorsed]: Filed Oct. 21, 1915. Walter B. Maling, Clerk. **[46]**

In the District Court of the United States, for the Northern District of California.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

(Clerk's Certificate to Judgment Roll.)

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 21st day of October, 1915.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed Oct. 21, 1915. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [47]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on the 22 day of May, 1914, at a stated term of the District Court of the United States for the Northern District of California, the above-entitled cause came on regularly for trial before the Honorable Wm. C. Van Fleet, Judge of the said Court, the jury having been during the course of the trial duly waived in the manner required by law in writing, Nathan H. Frank, Esq., appearing as attorney for the plaintiff, and Ira

A. Campbell, Esq., appearing as attorney for the defendant.

And thereupon the following proceedings were had:

Mr. Frank and Mr. Campbell made their opening statements to the jury.

Mr. Frank offered in evidence the policy of insurance. It was received in evidence and marked "Plaintiff's Exhibit No. 1" and is hereunto annexed, marked "Exhibit No. 1."

Mr. Frank then offered in evidence the contract of affreightment, to which offer the following objection was made: [48]

Testimony of W. P. Mulhern, for Plaintiff.

Mr. CAMPBELL.—We object to the admission on the ground that it is incompetent, irrelevant and immaterial and not binding upon the defendant Insurance Company in any of the matters which are affected by the issues in this case.

The Court thereupon overruled defendant's said objection and received in evidence and marked said document as "Plaintiff's Exhibit No. 2," to which order defendant excepted and defendant now assigns said exception to said ruling as Defendant's Exception No. 1.

Said document is hereunto annexed and marked "Exhibit No. 2."

W. P. MULHERN was then called for plaintiff, was sworn, and testified as follows:

I am agent of the Trojan Powder Company at this port. I carried on the transactions here in controversy.

(Testimony of W. P. Mulhern.)

After the cargo came back here I did everything I possibly could to have the cargo forwarded to the port of destination by taking it up with the Insurance Company and the Steamship Company. I made application to the California Atlantic and Pacific Mail, the only two companies handling freight of that kind to the port of Ancon, Balboa. I called on Mr. Page (defendant's agent) to ascertain what action his Company would take in regard to seeing that the shipment was forwarded without delay upon the first available boat. He refused, I believe, to have anything to do with it; he said it was a matter out of his hands. Then I went to both the Pacific Mail and California Atlantic. The latter had the first boat going out, namely, the "Portland," September the 7th, but the shipment on the "Pleiades" had not returned at that time. I made these inquiries before the cargo got back. After the cargo got back the first ship was the "Mackinaw," run by the California [49] Atlantic. I went to them and asked them if they would return it without an additional freight, and they absolutely refused to do that, so in the end I was compelled to reserve space on the "Mackinaw," which I believe left on October 17th. I had to pay the California-Atlantic a freight charge of $4,050, to carry it forward on the second voyage. They would not take the shipment forward on the "Mackinaw" for the same freight money that had been paid for forwarding it on the "Pleiades." They required another payment according to the terms of the bill of lading.

(Testimony of W. P. Mulhern.)

Mr. FRANK.—What was the necessity of getting that cargo forwarded at that time?

A. If we did not deliver it within a certain time we were subject to a penalty of one-tenth of one per cent per day and were liable to have the shipment refused. Upon the condition their contract provided for that.

I don't believe there is any market at the port of destination other than the Panama Canal Commission for any considerable amount of explosives, and particularly, for those grades, as one of them was a grade of 45% and the other 60, and the demand for 60 is not nearly as great as the lower grades.

The vessel was repaired and redelivered to the California-Atlantic on December 27th, 1912.

I believe we received a notice that the California-Atlantic had gone into bankruptcy about January 1st or 2d, 1913.

Mr. FRANK.—Do you know whether the vessel ever went on that voyage?

Mr. CAMPBELL.—We object to that as being irrelevant and immaterial. [50]

The Court thereupon overruled defendant's said objection, to which order defendant excepted, and defendant now assigns said exception to said ruling as Defendant's Exception No. 2.

A. It never did.

Mr. Frank then offered in evidence a copy of the notice of abandonment, to which offer the following objection was made:

Mr. CAMPBELL.—I object to it being offered and

(Testimony of W. P. Mulhern.)

received in evidence for the reason that it is incompetent, irrelevant and immaterial. The question of the claim for a constructive total loss on this policy is not an issue in this case and the only purpose of the abandonment now is to make a constructive total loss a valid claim under the policy.

The COURT.—I cannot intelligently determine whether eventually it will turn out to be material or not. I will have to admit it in evidence subject to its being hereafter stricken out if it is not in anywise connected.

The said notice of abandonment was thereupon introduced in evidence and marked "Exhibit No. 3," a copy of which is hereto attached and made a part of this Bill of Exceptions and marked "Plaintiff's Exhibit No. 3."

Thereafter, Mr. Campbell made the following motion:

Mr. CAMPBELL.—If the Court please, I move to strike out the notice of abandonment which was offered in evidence. Your Honor will recall that I objected to its admission upon the ground that there was no question of constructive total loss in the case and that the only purpose the notice of abandonment could serve would be to lay a foundation for a recovery as for a constructive total loss. [51]

Mr. FRANK.—The purpose of putting in evidence the notice of abandonment was not to create a constructive total loss, but to bring the case within the provisions of the decision of Great Peninsula Railway

Company v. Saunders. That was the entire purpose of it.

The COURT.—I think that was conceded at the time, substantially. * * *

The COURT.—I think the motion to strike will at this time be denied; I am not prepared to say that it may not have a material bearing upon certain features of the case.

The Court thereupon overruled defendant's said objection and denied defendant's said motion to strike out said notice of abandonment, to which orders defendant excepted, and defendant now assigns said exception to said rulings as Defendant's Exception No. 3.

Mr. Frank then offered and read in evidence Section 214 of Arnould on Marine Insurance (8th ed.) as follows:

> "When, in consequence of a peril insured against, the voyage cannot be accomplished in the original ship, it seems that the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight which he would have had to pay in the ordinary course is a loss directly due to such peril. The practice of underwriters has been to pay such excess as particular charges, and as one of the objects of an insurance on goods is to guarantee that the goods shall reach their destination, it is submitted that this practice is correct in principle. It is certainly not inconsistent with the provisions of the Marine Insurance Act."

Mr. FRANK.—I am going to read the Insurance Act in connection with this, and in that connection I think it is pertinent. He referred in the note to that Act, and that is the reason it becomes pertinent,—Sec. 64, subd. 2 of the Marine Insurance Act, which [52] is what the author refers to by indicating it in the note.

Thereupon, counsel read as follows:

> "Expenses incurred by or on behalf of the assured for the safety or preservation of the subject matter insured, other than general average and salvage charges are called 'particular charges'. Particular charges are not included in 'particular average.'"

Mr. FRANK then offered and read in evidence Section 869 of Arnould on Marine Insurance (8th ed.) as follows:

"Another class of losses, which, though not specially enumerated in the policy, are nevertheless recoverable thereunder, is that which is embraced under the term 'particular charges.' The distinction between 'particular charges' and 'particular average' was first definitely established in our Courts in Kidston v. Empire Insurance Co., where the jury after hearing the evidence of several average-adjusters and other witnesses, found that there was in the business of marine insurance a well-known and definite meaning affixed by long usage to the term 'particular average' as distinguished from the term 'particular charges'—viz., that 'particular average' denotes actual damage done to or loss of part of the subject matter of insurance, but that it does not include any

expenses or charges incurred in recovering or preserving the subject-matter of insurance; and that expenses incurred in warehousing and forwarding goods are not 'particular average,' but are termed 'particular charges.'

"Accordingly sec. 64, sub-sec. (2), of the Marine Insurance Act states that 'expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called 'particular charges. Particular charges are not included in particular average.' They are recoverable from underwriters when incurred after the arising of a peril insured against, in order to prevent such peril causing a loss for which the underwriters would be liable, if it were so caused. In this event they are charges incured 'in and about the defense and safeguard' of the subject-matter of insurance, within the suing and laboring clause. In certain cases they may also be recoverable from underwriters, apart from the suing and labouring clause, as losses occasioned by a peril insured against when they have been necessarily incured in consequence of such a peril—as, for example, expenses of warehousing and forwarding cargo, when a peril insured against has occasioned the necessity of such expenditure." [53]

Mr. Frank then offered and read in evidence the case of Barker v. Blakes, 9 East's Rep. 282, as follows:

"This was an action on a policy of insurance on a quantity of oil by the ship 'Hannah,' at and from New York to Havre de Grace, dated the 4th of Au-

gust, 1803; which was tried before Lord Ellenborough, C. J., at the sittings at Guild Hall after Hilary term 1807, when a verdict was found for the plaintiff for 45£, 2s. 8d., subject to the opinion of this Court on the following case:

"The insurance was effected on behalf of the plaintiff, an American citizen resident in America, and the proprietor of the oil. The defendant subscribed the policy for 100£. The oil was of greater value than the amount of all the insurance made upon it. The ship 'Hannah' was an American ship, duly documented, and sailed from New York on the voyage insured on the 4th of July, 1803, with the oil on board; and on the 17th of August following was arrested in latitude 49 degrees north, longitude 8 degrees west, (being in the course of the voyage), by 'The True Blue,' a British privateer, and sent into Bristol where she arrived on the 30th of the same month. Havre de Grace is in latitude 49 degrees north, longitude 6 minutes east. On the 21st of June, 1803 the following decree was issued by the French Government, 'That from thence forth there shall not be received into any of the ports of the French Republic any colonial commodity coming from English colonies, nor any goods coming directly or indirectly from England.' 'Consequently all goods and merchandise of English manufacture, or coming from English colonies, shall be confiscated.' On the 6th of September 1803, the British Government declared the port of Havre to be in a state of blockade; and such blockade has continued ever since. The ship and cargo were libelled in the court of Ad-

miralty by the captors; and on the 8th of October following the ship and the oil in question, and the rest of the cargo, were, by a sentence of that Court, ordered to be restored to the use of the owners; subject to the payment of freight and expenses, but without costs or damages; except one box of books, which was condemned as French property; and 53 hogs-heads of bark, and 3646 pounds of whalebone, which were then reserved for further proof, and were afterwards condemned as lawful prize by the following sentence: '"Hannah," Augustus Ryan, 9th Nov. 1804. No further proof having been exhibited of the property of 53 hogsheads of bark, and 3646 lb. of whalebone; and the Judge, at the petition of Bog, on motion of counsel, by interlocutory decree, condemned the said goods as good and lawful prize to Edward Vincent Paul, commander of the private ship of war "True Blue," in sight of his Majesty's ship of war "Phoenix," Wm. Baker, Esq. commander.' On the 14th of [54] October, 1803 the plaintiff's agents in this country, who had effected the policy, abandoned the oil in question to the defendant and the other underwriters, in proportion to their respective interests. The agents of the plaintiff were apprised of the detention of the vessel, and of the suit in the Court of Admiralty, soon after they respectively took place; but were not parties to the suit, and did not know of the restoration of the vessel and cargo until the 17th of October, three days after the abandonment. The plaintiff's agents afterward applied to the captain of the ship 'Hannah' to reload the oil

and convey it to Havre, which he positively refused to do, and declared that he should sail directly to New York. The ship 'Hannah' cleared out at Bristol on the 20th of December 1803 for New York, and in January 1804 sailed for that place, leaving the oil in question at Bristol. The oil was afterwards sold in this country by agreement, without prejudice to the question between the assured and underwriters, to the best possible advantage; and the loss amounted in the whole to 45£ 2s. 8d. per cent, of which the freight and expenses of restoration, paid under the sentence of the Court of admiralty, amounted to 20£ 19s.; that is, the freight alone to 12 per cent, the expenses to 8£ 19s. per cent. The question for the opinion of the Court was, whether the plaintiff were entitled to recover the whole, or any and which of the said sums? If the Court should be of the opinion that he was entitled to recover anything, the verdict was to be entered accordingly; otherwise a nonsuit was to be entered.

"Lord ELLENBOROUGH, C. J., delivered judgment.

"This was an action on a policy of insurance, dated the 4th of August, 1803, on a quantity of oil belonging to an American proprietor, shipped on board an American ship, the 'Hannah,' on a voyage at and from New York to Havre de Grace. (After stating the case, his Lordship proceeded.)

"The whole amount of loss claimed on the part of the plaintiff is 45£ 2s. 8d., consisting of 201£ 19s., the freight and expenses paid under the sentence of the Court of Admiralty, and 24£ 3s. 8d., the differ-

ence, I presume, between the invoice value of the oil in America, and the proceeds of the sale here. The defendant contends, that the plaintiff is at any rate not entitled to recover the latter item of loss; his claim thereto being merely founded on an abandonment which was not made, as the defendant insists, in due time. But he further contends, that the plaintiff cannot by law recover at all, even to the extent of the average loss of his freight and expenses, under this policy; and that to allow of such a recovery would be to allow of an indemnity being afforded, through the medium of British insurance, to neutrals, acting in contravention of **[55]** the interests and policy of Great Britain, in the carrying of the goods of its enemies. That in so doing the neutral had, in effect, violated the duties of his neutrality, and assumed a hostile character in respect to this country. But it does not appear to us, that this general objection to the plaintiff's right to recover is well founded. The American was at liberty to pursue his commerce with France, and to be the carrier of goods for French subjects; at the risk, indeed, of having his voyage interrupted by the goods being seized; or of the vessel itself, on board of which they were, being detained or brought into British ports, for the purpose of search; but the mere act of carrying such enemies' goods on board his vessel constituted no violation of neutrality on the part of the American; nor did the arrest and detention of his vessel, for the purpose of search and eventual condemnation of the goods which might be found on board belonging to the enemy, form any

breach of our duty towards the American. The indemnity sought under the policy in this case is not an indemnity to an enemy, or to a neutral forfeiting his neutrality by an act hostilely done by him against the interests of Great Britain; but an indemnity to a neutral, as such against the consequences of an act innocently and allowably done by him in the exercise of his own neutral rights; and as innocently and allowably to a certain degree controlled and interrupted on our part, in the exercise of our rights, as belligerents, against enemies' property found on board the ship of a neutral. These rights, though they are in a degree adverse to each other, do not, therefore, in the exercise of them, necessarily place either party in the situation of an enemy to the other. The various competitions for commercial advantage and superiority, which take place between different nations; their mutual exclusions of each other by their respective municipal regulations; are so many acts of adverse policy and conflicting rights, exercised towards each other; but they occur without producing any breach of national amity. And it has never yet, in any instance that I am aware of, been held a breach of implied duty in the subjects of either state to lend their assistance by insurance or otherwise to such rival or exclusive commerce or interests of the other. Cases of express public prohibition, and that degree of assistance to enemies which constitutes a society in war against any particular state, fall of course under a different consideration, and are necessarily to be understood as interdicted subjects of insurance

in every country to which this species of contract is known. The voyage and commerce, therefore, in the course of which the vessel carrying the goods insured was in this case engaged, not being either of a hostile description, nor in any other way expressly or impliedly forbidden by [56] the law or policy of this country, the general objection to the plaintiff's recovery at all under this policy of assurance falls to the ground. Which brings the case under our consideration to this point, whether the plaintiff be entitled, under the circumstances, to recover as for a total loss, or for the freight and expenses adjudged by the Court of Admiralty to be paid, as an average loss only.

"In order to entitle himself to recover as for a total loss, the plaintiff must establish two things: First, That a loss of the voyage (the only description of loss which can be contended for in this case, as the goods themselves have been ordered to be restored, and are capable of being so), was occasioned by the detention in question, which continued until and after the blockade took place, which rendered the prosecution of the voyage to Havre no longer practicable; and, secondly, (supposing a loss so occasioned to be a total loss, 'by detention,' within the policy); that the abandonment of the goods was made in due time. And thinking, as we do, that the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the prolonged detention of the ship and cargo, may be properly considered as a loss of the voyage; and such loss of voyage, upon received principles of

insurance law, as a total loss of the goods which were to have been transported in the course of such voyage; provided such loss had been followed by a sufficiently prompt and immediate notice of abandonment. We are of opinion, however, upon the authority of the cases adverted to in the argument, that this abandonment which was made on the 14th of Oct. 1803, above five weeks after the blockade of Havre had been publicly notified; the latest event to which the loss of voyage is capable of being referred; was not made within those reasonable and convenient limits of time which the law allows for this purpose. And it is to be observed, that no excuse for the lateness of the abandonment is offered on the score of any want of competent powers in the parties making the abandonment; as they do not appear to have been furnished with any other powers for this purpose at last, than what they must be supposed to have originally possessed, if they ever had any. The loss in question must, therefore, for want of a timely notice of abandonment, be regarded merely as an average loss; and the verdict must of course be restricted to the sum of 20£ 19s. the amount of the freight and expenses to which the assured was subjected by the sentence of the Court of Admiralty. Judgment for that sum, and no more, must be given accordingly." [57]

Mr. Frank then offered and read in evidence the case of Great Indian Peninsula Ry. Co. v. Saunders, 1 Ellis, Best & Smith, Q. B. 41; 121 English Reprint, 630, as follows:

"In November, 1858, the plaintiffs shipped at

London on board The 'Bombay' bound for Kurrachee and Bombay, with leave to call at Cork for troops about 480 tons of iron rails, to be conveyed to Bombay for the plaintiffs, upon the terms of the following bill of lading.

'Shipped in good order and well conditioned, by The Great Indian Peninsula Railway Company, in and upon the good ship called The 'Bombay,' whereof is master for the present voyage Hamanck, and now riding at anchor in the river Thames, and bound for Bombay, with liberty to land passengers at Kurrachee, 1995 bars railway iron, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Bombay (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever excepted, save risk of boats as far as ships are liable thereto) unto the secretary of the said Company, or to his assigns, freight for the said goods, to be paid here, ship lost or not, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which bills being accomplished the others to stand void. Dated in London, 2d November, 1858. Weight and contents unknown to THOMAS HAMANCK.'

"In the margin were inserted the particulars of the rails, together with this note. 'Weight, contents and value unknown, and not answerable for leakage,

breakage or rust, nor loss by vermin. E. Gellatt, for D. Dunbar.'

"On the 2d day of November, 1858, the plaintiffs paid to the owners of The 'Bombay' the sum of 629£ 9s. 10d. for freight on the rails mentioned in the bill of lading, being at the rate of 25s. per ton.

"On the 11th day of November, 1858. the plaintiffs effected a policy of insurance at Lloyd's for the sum of 4500£ on rails valued thereat, 'warranted free from particular average, unless the ship be stranded, sunk or burnt. General average payable according to foreign statement' etc. The defendant subscribed this policy for the sum of 50£.

"The sum of 4500£ mentioned in the policy as the value of the rails included their first cost, and also the above-mentioned freight, as well as the insurance and shipping charges.

"Soon after The 'Bombay' sailed she experienced very heavy gales, had all her masts carried away by [58] tempests, became entirely disabled, and was eventually towed into Plymouth, on December 5th, 1858, by Her Majesty's ship 'Argus.' On her being surveyed, it was ascertained that the expense of repairing her would exceed her value when repaired, and thereupon notice of abandonment of the voyage was given to the shippers by the shipowners, and she was shortly afterwards broken up; the expense of repairing her being an expense which no reasonable person would have incurred.

"The iron rails which the plaintiffs had shipped in The 'Bombay' were without delay taken out of her by the plaintiffs, and by them shipped to London,

and there shipped by the plaintiffs on board three other vessels. At the time of that shipment the rates of freight had risen, and the plaintiffs were compelled to pay freight at the rate of 30s. per ton on the rails shipped in one of them, and of 40s, per ton on those shipped in the other two, such freights amounting in the whole to 825£ 11s. 7d. The three vessels into which the rails were shipped arrived in due course at Bombay, with the rails on board in safety.

"The question for the opinion of the Court was, whether the defendant, as one of the underwriters, was liable to pay to the plaintiffs his proportion of that sum of 825£, 11s, 7d., or any part thereof.

* * *

"BLACKBURN, J.—In this case the plaintiffs insured themselves by the ship Bombay, on a voyage to Kurrachee or Bombay, by a policy in the ordinary form of a Lombard Street policy, on 'rails valued at 4500£., warranted free from particular average; unless the ship be stranded, sunk or burnt.' It is upon this warranty that our judgment depends.

"It appears, by the statement in the special case, that the goods were shipped on board the 'Bombay,' to be carried on the voyage for a sum, inaccurately called freight, to be paid here, ship lost or not lost. The ship was, by perils of the seas, disabled and obliged to put into Plymouth, in such a state that she was not worth repairing; and no doubt, therefore, there was what is commonly called a constructive total loss of the ship; but she was neither stranded, sunk, nor burnt. The rails—the subject-matter of the insurance—were saved, and were sent on in other

vessels to their destination; and, in order to forward them to their destination, it was necessary to pay freight to the extent of 825£, 11s, 7d. As the original contract of carriage was for a sum to be paid here, ship lost or not lost, the whole of this sum of 825£, 11s, 7d, was an extra expense incurred by the shippers of the goods, in consequence of the sea risk which had frustrated the voyage of the 'Bombay'; and the question we have to determine is, whether the insured can recover this sum on a policy containing this warranty. [59]

"In Mumford v. The Commercial Insurance Company, 5 Johns. Rep. (U. S.) 262, cited 1 Phill. on Insurance 678, 3d ed., the insured on a policy, in which there was no warranty against particular average, recovered in the courts of New York on a claim similar to this. No such decision has been come to in the courts of this country; and we are not called upon in this case to determine whether, in the absence of such a warranty, the party could or could not recover; for we are of opinion that, if he could recover, it would be on the ground that the disbursement for the extra freight was part of the loss occasioned to the owner of these particular goods by the perils of the seas, or, in other words, a particular average on these goods; and, therefore, within the warranty.

"Mr. James contended that 'particular average' bore a more restricted meaning—that it was confined to losses arising from injury to, or deterioration of, the goods themselves, and did not include expenses incurred in relation to the goods; but we find no authority for this. In Arnould on Insurance, p. 970 (2d

ed), we find the definition of a particular average stated to be 'loss arising from damage accidentally and proximately caused by the perils insured against, or from extraordinary expenditures necessarily incurred for the sole benefit of some particular interest, as of the ship alone, or the cargo alone.' And the same learned author says, at p. 875, "that an insurance on goods warranted free of average unless general, is equivalent to an insurance against their total loss only'; which indeed necessarily follows from the definition already quoted. Mr. Phillips, in his Treatise on Insurance, Sec. 1422, defines particular average to be, 'a loss borne solely by the party upon whose property it takes place, and is so called in distinction from a general average, for which different parties contribute.' The same learned author, in Sec. 1767, says that an insurance against total loss, only, and an insurance with the exception of particular average, are equivalent forms.

"No case has been cited, nor are we aware of the existence of any, tending to show that these definitions of particular average are inaccurate.

"We think that we must put the same construction on this policy as if it had been expressed to be 'against total loss and general average only'; and, if so, it is self-evident that the claim in the present case cannot be in any way treated as a total loss, or a general average.

"It was, however, further argued by Mr. James that the plaintiffs were entitled to recover under the clause which authorizes the insured to sue and labour for the preservation of the subject-matter of the in-

surance. It is not necessary to decide whether an underwriter on a policy against total loss only is, [60] under this clause, liable for expenses incurred by the assured for the purpose of rescuing the subject-matter of an insurance from a state of peril which might have resulted in a total loss, but did not. There are reasons both for and against this stated by Mr. Phillips in his Treatise on Insurance, Sec. 1777; and the question seems never to have been actually decided. But in the present case it does not arise. The expenses here were incurred for the purpose of forwarding the subject-matter of insurance to its destination, at a time when the iron was not in any peril of total loss, either actual or constructive. Had the insured chosen, instead of paying this extra freight, to sell the rails in England, as he might have done if he pleased, he could have made no claim on the underwriters; for it would not have been a constructive total loss, according to Rosetto v. Gurney, 11 C. B. 176 (E. C. L. R., Vol. 73), unless the amount of the extra freight exceeded the value of the goods when forwarded which is not the case here; and an actual total loss is out of the question.

"It seems to us that the plaintiffs here cannot in any view recover, unless we deprive the warranty of the effect which it was intended to have. We therefore give judgment for the defendant."

Mr. Frank then offered the case of Popham and Willett v. The St. Petersburg Ins. Co., 10 Commercial Cases, 31, to which offer the following objection was made:

Mr. CAMPBELL.—If the Court please, I object

to the admission of that case in evidence for this reason: that case is founded upon a form of policy which contains an express clause covering forwarding charges. The clause in that policy is entirely distinct and different from the clause in this policy.

The Court thereupon overruled defendant's said objection, to which order defendant excepted, and defendant now assigns said exception to said ruling as Defendant's Exception No. 4.

And the Court thereupon permitted said case to be read in evidence as follows: **[61]**

"By policies dated July 8/20, 1899, issued under a floating policy of earlier date, the defendants insured the plaintiff's goods and freight by named steamers for a voyage from London to places on the rivers Obi and Yenisei in Siberia, via. the Kara Sea; the policies enumerated the usual perils and were expressed to be 'warranted free from average unless general, or the ship be stranded, sunk, on fire, damaged by ice or in collision,' and they also contained the following clauses:—'To pay landing, warehousing, and forwarding charges should the same be incurred as well as partial loss arising from transhipment and/or re-shipment.'

" 'On English Lloyd's conditions and to cover all risks as per bill of lading, including the negligence clause and the risk of collisions and/or contact with ice and/or any substance other than water.'

"These policies were taken out by the plaintiffs in contemplation of an expedition for the importation of goods into Siberia, via. the Kara Sea and up the rivers Obi and Yenisei, by lighters. The advantage

of this route was that by it goods were admitted into Siberia at a low rate of duty, whereas the duty which would have to be paid on goods passing through European Russia was very heavy. The plaintiffs had successfully carried out similar expeditions in the years 1897 and 1898. The present action arose out of the failure of an expedition in 1899. The plaintiffs loaded four steamers which they chartered and one steamer of their own with goods partly belonging to themselves and partly belonging to other persons.

"The vessels sailed from London in the middle of July, 1899; they reached the entrance to the Kara Sea and there met with ice on August 11. They unsuccessfully attempted to get through by two different routes and all sustained damage from the ice and were driven aground temporarily. On August 30 it was resolved to abandon the expedition. On August 31 one of the ships was wrecked by being rammed by a spiked mass of ice. The vessels were involved in the ice up to September 3, when they got clear and returned to London.

"The ice which they encountered was not due to the Kara Sea, being frozen up in the regular course for the winter season. The difficulties arose from the fact that at the time when the vessels reached the entrance to the Kara Sea there had, for some time, been continual northerly and northeasterly winds prevailing, and these, combined with currents from the Arctic Seas, had driven a stream of masses of ice down towards the Siberian coast.

"Upon the return of the vessels to London the

goods were landed and warehoused. The plaintiffs returned the goods belonging to other persons to their owners, and claimed, under the terms of the bills of lading, payment of the freight. Some of the plaintiffs' own goods were sold, and some were subsequently forwarded to their destination through Russia. This forwarding did not take place till June, 1900. The delay was caused [62] chiefly by there being negotiations with the Russian Government for the admission of the goods into Siberia at a reduced duty. These negotiations were abortive, and the plaintiffs had to pay, in respect of the goods forwarded, a much heavier duty than they would have paid had the goods arrived by the route originally intended. The plaintiffs claimed in the action a total loss under the policies on freight and on goods; also for a partial loss on the policies on their own goods, and for landing, warehousing, and forwarding expenses. On the claims for total loss, the learned judge held that if there had been a total loss, it was a constructive total loss, and that the plaintiffs, having given no notice of abandonment, they could not recover on those claims. The present report deals with the case only so far as it relates to the obstruction by ice and to the claim for landing, warehousing and forwarding expenses, in which the plaintiffs included the increased duty paid, as above stated.

* * *

"WALTON, J., after stating the facts, continued:—The first question which has been raised is whether the obstruction to these steamers by ice in the Kara Sea was or was not a peril of the seas

within the meaning of the policies. It was said to be analogous to the closing of a port by ice in the winter and the obstruction so created to a vessel arriving at her destination at that port. In such a case the annual regular obstruction of the port by the ice in winter is in no sense an accident; it is part of the ordinary course of things, like the ebb and flow of the tides. It is scarcely necessary to say that difficulties arising merely from the ordinary closing of a port, which is subject to be closed, and is always closed, in the winter months, do not amount to a peril of the seas within the ordinary meaning of a policy of marine insurance. But that was not this case. The obstruction by ice in this case was accidental and unexpected. As far as I can understand, there had been no obstruction to the expedition in either 1897 or 1898. The unexpected prevalence of certain winds and the currents in the Arctic Seas in August, 1899, created an extraordinary difficulty and danger, for this ice was not only an obstruction, it was also a danger; one vessel was wrecked and the others were more or less damaged. The conclusion which I have come to is that the obstruction and danger and difficulty from the ice which these vessels met with was a peril of the sea, and one of the perils covered by the policies.

"(Having considered the claims for total loss of freight and of goods above referred to, his Lordship continued:—)

"With regard to the partial loss of goods, different considerations apply, because the absence of notice of abandonment does not prevent the plaintiffs from

recovering for any partial loss which they, in fact, have suffered. They claim the expenses which have been incurred for landing, warehousing, and forwarding the goods. It is said that these expenses are not recoverable, because the forwarding of the goods was not forwarding them upon the voyage [63] insured—that the voyage insured was altogether abandoned as an adventure, and that the subsequent forwarding of the goods was a mere incident in their history, and on a totally different adventure. I cannot take that view. I think that everybody knew that this voyage was one in which there might be delay. It was a voyage exposed to peculiar difficulties, and if the goods did not arrive at their destination in the Kara Sea in August or September, 1899, there might be considerable delay in forwarding them in any other way. There was delay. I need say no more about it, except this, that, in my opinion, the delay that took place does not show that the adventure of forwarding the goods was a different adventure. It seems to me that it was still the same forwarding, although by other means, though there were matters to be considered which involved considerable delay. I, therefore, think that the plaintiffs are entitled to recover in respect of any partial loss which they suffered, in consequence of the vessels being prevented from arriving at their destination by the ice in August and September of 1899. That brings me to another question, which has a direct bearing on this claim for forwarding expenses. It is whether the duty paid on forwarding can be taken into account. I think it can. I think it is one of the

forwarding expenses, and must be taken into account. It has been said that the duty is in the nature of a toll. Be that so or not, it seems to me that it is an expense which had to be incurred in order to forward the goods, and I think that it is, in any ordinary business-like sense, part of the cost of forwarding, and, therefore, must be taken into account in adjusting this claim."

Mr. Campbell then moved to strike out the foregoing, whereupon the Court asked Mr. Frank: "What pertinency do you claim for that case in the present controversy?"

Mr. FRANK.—That case in the present instance shows that the forwarding by the second vessel is part of the same venture, and it shows also that the forwarding is a loss under that policy, a direct loss by reason of a peril of the sea. One of the contentions set up in the answer is that this is not a loss by a peril of the sea. These goods were in exactly the same position. And I also will contend, when we come to submit the case, that this policy with this provision is no different with respect to this [64] matter of forwarding charges from the policy than we have under consideration. The construction of the present policy from my point of view is such as to import that it has a dual liability, one arising from it as a direct loss by peril of the sea, and a second arising by reason of the provision concerning the forwarding which by implication makes that a part of that policy.

Mr. Campbell then made the following motion:

I move the Court to strike out the testimony or the

evidence as to that case upon the ground that it is immaterial, irrelevant and incompetent because the policy there contained the express insurance clause to pay forwarding, landing and warehousing expenses, and the clause in our policy contains the following language:

> "to pay any special charges for warehousing or shipping or forwarding for which they otherwise would be liable."

One is an express insurance against forwarding charges and the other is not. The whole decision of that case is simply that the insurance company was liable for those forwarding charges under those particular policies.

The COURT.—There is more than that. Those general considerations are not based upon the particular feature of that clause at all. He is discussing what would amount to a peril of the sea. The perils of the sea insured against there, if I recollect, were substantially the same as they are here. He held that the encountering of the ice in the manner in which the opinion relates was a peril of the sea, and the injury resulted from a peril of the sea, and that the subsequent forwarding, although remotely removed from the original venture, but nevertheless a part of the original forwarding, or to be regarded as such. [65]

The Court thereupon denied the said motion to strike out the said case, to which order defendant excepted and defendant now assigns said exception to said ruling as Defendant's Exception No. 5.

Mr. Frank then offered and read in evidence the

case of Popham and Willett v. The St. Petersburg Ins. Co., 10 Commercial Cases, 276, as follows:

"The plaintiffs were time-charterers, and for the purposes of the case were treated as owners of the steamship 'Buccaneer.' They employed her for the purpose of carrying goods from London to Siberia by the Kara Sea. Amongst the goods carried was machinery belonging to the plaintiffs themselves and certain resin and rice belonging to Mr. J. Singer. Insurances were effected in respect of these goods by three separate marine policies as appears in the head-note. Each of the policies contained the ordinary suing and labouring clause and also a clause in the following words:

" 'To pay landing, warehousing, and forwarding charges, should the same be incurred, as well as partial loss arising from transshipment and reshipment.'

"The vessel encountered unusual obstruction and danger from ice in the Kara Sea, and being unable to proceed to her destination, abandoned the voyage and returned to London, where her cargo was discharged. Considerable expense was incurred in landing and warehousing the goods and in forwarding them to their destination.

"By a judgment delivered in the action by Walton, J., the plaintiffs were held entitled to recover certain landing, warehousing, and forwarding expenses, and in adjusting the amounts so recoverable, questions arose which now came before the Court for argument.

"In respect of the expense amounting to £2025 of

forwarding the plaintiffs' machinery they claimed under the freight policy up to the insured value of the freight, namely, £1228, and under the goods policy they claimed to recover £1126, namely, the total expense of forwarding, less £899, which was the actual value of their interest in the nature of freight in respect of the goods. The claim under these two policies, therefore, exceeded the actual amount expended in forwarding.

"Under the policy on Singer's goods the plaintiffs (on behalf of Singer) claimed to recover the expense incurred in forwarding the goods without making any deduction for the bill of lading freight. The defendants denied that the bill of lading freight had been paid, and contended that it should be deducted.

"Such other facts and figures as are material may be gathered from the headnote and judgment. [66]

"WALTON, J.—I decided, by my judgment, delivered on November 8, 1904, that the plaintiffs could not recover for a total loss, and since that judgment the claim upon a different footing, namely, for landing, warehousing, and forwarding expenses, has been adjusted. Some objections have been raised to the adjusted claim with which I have now to deal. One of the matters in dispute is the claim in respect of forwarding 96 packages of machinery, which were shipped by the plaintiffs themselves. In respect of these goods, they were in the position of ship owners carrying their own goods in their own ship. They insured the goods, and by a separate policy they insured, under the name of 'freight,' as they might do, the profit derivable by them from the employment of

their ship to carry their own goods. This interest, called, as I have said, 'freight' in the policy, was valued at £1228, 3s, 10d. When, in consequence of the difficulties encountered in the Kara Sea, the goods were brought back to London, they were forwarded to their destination at a cost amounting to £2025. In the way in which the claim is made up the plaintiffs claim in respect of the 'freight' policy their forwarding expenses up to the full amount at which the 'freight' is valued in the policy, that is £1228. Under the policy on goods they claim an amount of £1126 arrived at by deducting from the £2025 not the £1228 claimed under the freight policy, but a sum of £899, which they say was the actual value of their interest in the nature of freight; this gives a balance of £1126. In this way the plaintiffs seek to recover altogether in respect of these expenses not the actual sum incurred, £2025 is 4d, but a larger amount, namely, £1228, plus £1126, which comes to £2354. This seems to me to be wrong.

"The defendants further contended that the plaintiffs were not entitled to recover the whole £2025; that they could only recover either under one policy, or that if the plaintiffs recovered £1228 under the freight policy, they could not recover under the goods policy more than the balance of the £2025 after deducting both the £1228 and the £899,, the actual value of the freight, on the ground that such freight must be treated as not payable or paid, and so saved to the goods owner. I think that these contentions cannot be supported. A loss in either interest was averted by the expenditure of £2025; both interests were

saved. The actual expenditure must be borne between them, but the assured cannot recover for forwarding expenses more than the sum actually expended. The precise mode of apportionment in the present case is unimportant, since the assured and the insurers under each of the policies are the same. I think, therefore, that the plaintiffs are entitled to recover £2025 under the two policies.

"There was another claim in respect of 600 bags of resin and 400 bags of rice. These were goods belonging to one, Singer, which were insured by the plaintiffs, [67] and which were forwarded to their destination in Siberia at a very heavy expense. There is a claim for these forwarding expenses. Part of the freight in these goods was paid by Singer to the plaintiffs, but there was a balance of £288 which was not paid. In making the claim for forwarding expenses in respect of these goods no deduction is made for freight. In the adjustment there is this note, 'the original freight at risk not deducted as to be considered earned in London.' The objection is made that the defendants require proof that the plaintiffs received freight on these goods on their return to London. On behalf of the plaintiffs it is pointed out that this freight was, by the terms of the bills of lading, payable when the goods were returned to London after the failure of the expedition, whether the goods were forwarded or not. It seems to me that the reason for deducting the freight from the forwarding expenses in the case of a claim of this kind is that the freight is saved to the goods owner by the expenditure in respect of which the claim is

made. That is to say, if the owner of the goods, when the ship cannot carry them on, carries or has them carried at his own expense, he gets them to their destination, but as the ship has not carried them, he ordinarily is not liable for the bill of lading freight, and therefore the freight is deducted so as to get at his actual net expenses in forwarding. Where, however, the freight is paid in advance, that is a plain case in which the freight is not saved, and the assured would be entitled to the forwarding expenses without a deduction for freight. Now, in this case the freight was not paid in advance, but by bills of lading it was payable in London, and payable whether the goods were forwarded or not. It seems to me, therefore, that the assured are entitled to recover these forwarding expenses, and are not bound to give credit for that which they have not saved, namely, the amount of the freight. Whether the freight has or has not been actually paid makes in this case no difference."

Thereupon the defendant made the following motion:

Mr. CAMPBELL.—I move to strike out the evidence in that case, if the Court please, upon the same grounds as to the preceding case; that the policy under which that recovery was had was different entirely in terms from the present policy. That was an express insurance against forwarding charges, whereas in this case it is not.

"The Court thereupon denied defendant's said motion, to which order defendant duly excepted and defendant now assigns said exception to said ruling

as Defendant's Exception No. 6. [68]

Mr. Frank then offered and read in evidence the case of Booth v. Gair, 15 Com. Bench. Reps. (N. S.), 290, and stated that the purpose of the offer of said evidence was to prove the custom and practice of the underwriters with respect to such charges. That it has been the custom and the practice of the underwriters in England to pay charges of this nature, under an ordinary policy against the perils of the sea.

Mr. Frank then made a general statement of the facts of that case material for the purposes of this trial, as follows:

That was a policy of insurance on bacon. The policy contained a sue and labor clause, and it also had the warranty free from average unless general, whether the ship be sunk, stranded or burned. She sailed from New York and met heavy gales, strained and leaked and finally bore away for a port of refuge where she came to anchor; her cargo was discharged, and upon an examination of the ship she was found so badly damaged that she could only be repaired at Bermuda at an expense exceeding her value when repaired, and she was accordingly condemned and sold. Surveys were held on the cargo to determine what should be sent on and what should be sold. Part of it was sold. And the remainder, including the remainder of the bacon, was transshipped on two vessels to Liverpool. The expense of transshipment and the freight exceeded the freight originally agreed to be paid. There were some warehousing expenses. It was admitted that there was no con-

structive total loss of the bacon, and that plaintiff sought to recover from defendant under said policy the difference between the amount of freight to be paid the first vessel and the sum total of the freight paid the other two vessels on the shipping charges, and also a portion of three other **[69]** items of expense incurred by reason of the vessel putting into Bermuda and the transshipment of the cargo. It was also admitted that down to the date of the policy involved herein, it was the custom of the underwriters to pay charges on cargo as to any of the items the subject-matter of this case except cooperage, under the name of particular charges.

Mr. Frank then read the following part of the statement of facts from the case:

"10. It was also admitted that, down to the date of the policy in this case, it was the custom of underwriters to pay charges on cargo of the nature of the items the subject of this case, except cooperage, under policies in the form of the policy in this case, under the name of 'particular charges.' "

The judgment of the court in said matter is as follows:

"Erle, C. J., now delivered the judgment of the court:

"This was an action on a policy from New York to Liverpool on a cargo of bacon, containing the clause, 'warranted free from average, unless general, or the ship be stranded, sunk, or burnt,' and other usual terms.

"In the course of the voyage there was a constructive total loss of the ship; but the cargo was landed

and warehoused. A part was found worthless, but the residue was sent on in common course, and arrived safe. The plaintiff claimed from the underwriter the expenses incidental to this transshipment of the cargo. The underwriter contends that he is freed by the warranty from these expenses. And although he admitted that the law must be taken, for the purpose of this argument, to have been correctly laid down in the case of The Great Indian Peninsular Railway Company v. Saunders, 1 Best & Smith, 41 (E. C. L. R. vol. 101), 2 Best & Smith, 266 (E. C. L. R. vol. 110); and although, under the circumstances of that case, the warranty exempted the underwriter from liability, and the clause authorizing the assured to sue and labour for the safeguard of the cargo did not make him liable; yet the learned counsel for the plaintiff has contended that the circumstances of this case made a distinction, and gave the assured a right to recover under the last-mentioned clause.

"But we are unable to find any substantial distinction between the two cases. There, the goods (iron) were returned to the assured at the port of loading in [70] an undamaged state, and sent on by them. Here, they were perishable goods, landed at a port on the voyage in a damaged state, and sent on by the master. What the master did in this case was in discharge of his duty in ordinary course; and there was no peril creating a risk of a total loss from which the underwriter was saved by the expenses in question. There were no other perils than such as

are always attendant on the transit of goods by the voyage in question.

"If the assured intended to confine the warranty to a partial loss from damage to the cargo, and to have the liability of the underwriter for expenses of transshipment, in our opinion this policy does not express that intention. Judgment for the defendant."

Mr. Frank then offered and read in evidence the case of Kidston and Others v. The Empire Marine Insurance Company, Limited, 1 Com. Pleas L. R. 535; 14 Eng. Ruling Cases, 247.

Mr. FRANK.—This case is principally offered at this time on the question of this practice and also because of the distinction it makes of the cases of the Great Indian Peninsular Railroad Company v. Saunders and Booth v. Gair, with respect to the underwriters being free under the particular average warranty from expenses of that nature.

"This was an action to recover 1145£ 3s. 6d. upon a policy of insurance effected in the sum of 2000£ by the plaintiffs, with the Empire Marine Insurance Company, on charter freight, valued at 5000£.

"The declaration contained a count on the policy, and the common money counts. The only material claims in the declaration were: first, a claim of the 2000£ insured, on the ground of the total loss of the charter freight; secondly, a claim under the suing and laboring clause of the policy, for the charges and expenses incurred by the plaintiffs by reason of the plaintiffs, their factors, servants, and assigns, suing,

labouring, and travelling in and about the defense, safeguard, and recovery of the subject-matter of the insurance,—thirdly, a claim for money paid to the defendants' use.

"The defendants pleaded to the first claim that the ship was not stranded, sunk, or burnt, and that the loss [71] was a particular average loss; to the second claim—first, that the charges and expenses so incurred as aforesaid constituted and were only particular average losses, from which the subject-matter of the insurance was warranted free,—secondly, that a loss or misfortune did not arise within the true intent and meaning of the policy,—thirdly, that there was no suing, labouring, or travelling in and about the defense, safeguard, and recovery of the subject-matter of the insurance, within the true intent and meaning of the policy. To the common counts, never indebted.

"The plaintiffs joined issue on the several pleas, and also demurred to the plea which set up that the charges were particular average losses.

"The cause was tried before Erle, C. J., at the London sittings after Michaelmas Term last, when it appeared that the plaintiffs' shipowners at Glasgow, were owners of the ship SEBASTOPOL; and the defendants were an insurance company carrying on business at Liverpool.

"On the 16th of March, 1863, the plaintiffs chartered the SEBASTOPOL to Messrs. Thomson & Co., by a charter-party, according to the provisions of which the ship was to proceed to the Chincha Is-

lands, there to load a cargo of guano, and thence to proceed therewith to the United Kingdom, for the stipulated freight 75s. sterling in full per ton of 20 cwt. net weight of guano at the Queen's beam; such freight to be paid as follows, viz.: 1,000£ in cash on arrival at port of discharge, three months' interest at the rate of 5 per cent being deducted, and the balance forty-eight hours after the true and right delivery of the whole cargo.

"On the 18th of August, 1863, the plaintiffs effected with the defendants the policy in question, being a policy of insurance in the sum of 2000£ by the SEBASTOPOL on charter freight valued at 5000£, warranted free from particular average, also from jettison, unless the ship were stranded, sunk, or burnt; the voyage insured by the said policy covering the aforesaid chartered voyage to the Chincha Islands and thence to the United Kingdom. The policy also contained the usual suing and labouring clause.

"The SEBASTOPOL sailed for the Chincha Islands, and there loaded a cargo of guano, with which she sailed for Cork; but, in the course of the voyage, she was compelled by stress of weather to put into Rio Janeiro, where she arrived on the 7th of February, 1864.

"On her arrival at Rio, the cargo of guano was discharged and properly stored and warehoused; and on being surveyed, she was found to have been so damaged by the perils of the seas as not to be worth repairing. She was therefore sold by the master at Rio on the 31st of March, 1864; the sale being in

all respects proper and necessary, and the ship herself being then a total loss. **[72]**

"On the 12th of March, 1864, the master of the SEBASTOPOL chartered the ship CAPRICE, at a freight of 37s. 6d. per ton, for the purpose of bringing the cargo of guano from Rio to the United Kingdom, and delivering it to its owners. The charter-party was made at Rio, and purported to be made between E. S. Harkey, master of the CAPRICE, and Duncan Taylor (on behalf of owners), master of the SEBASTOPOL, and was signed E. S. Harkey and Duncan Taylor. The cargo was accordingly taken from the warehouses where it had been stored and warehoused at Rio, and loaded on board the CAPRICE, and conveyed by that ship to Bristol, and there duly delivered to Messrs. Thomson & Co. the owners of the cargo. The plaintiffs paid to the owners of the CAPRICE 2467£ 11s. 10d., which was the agreed freight payable to that vessel for carrying the cargo from Rio to Bristol.

"Messrs. Thomson & Co., on delivery of the cargo, paid the charter freight 5000£ in full to the plaintiffs, who did not pay the same or any part thereof to the defendant.

"The plaintiffs did not give any notice of abandonment to the defendants.

"The expenses incurred at Rio in discharging, warehousing, and transshipping the goods, together with the freight, payable to the CAPRICE, amounted to about 3000£

"For the plaintiffs it was contended that they were entitled to recover from the underwriters the

expenses incurred in conveying the guano to the CAPRICE from the warehouses at Rio, which were less than 100£, and also the sum of 2467£, 11s. 10d., paid by the plaintiffs to the owners of the CAPRICE for carrying the cargo from Rio to the United Kingdom.

"For the defendants it was contended that they were not liable on the policy to repay to the plaintiffs any part of the said expenses, nor any part of the 2467£ 11s. 10d.

"At the trial several average-adjusters and other witnesses were called to prove the meaning of the term 'particular average' in the business of marine insurance; and the jury found that, up to the time of the policy in question there had been in the business of marine insurance a well-known and definite meaning affixed by long usage between the assured and the underwriter to the term 'particular average,' as contra-distinguished from the term 'particular charges,' in the manner described by the witnesses, viz.: that 'particular average' denotes actual damage done to or loss of part of the subject-matter of insurance, but that it does not include any expenses or charges incurred in recovering or preserving the subject-matter of insurance; and that expenses incurred in warehousing and forwarding are not 'particular average,' but are termed 'particular charges.' **[73]**

"Upon this finding of the jury, a verdict was entered for the plaintiffs, leave being reserved to the defendants to move to enter a verdict for them, or a nonsuit.

"MELLISH, Q. C., in Hilary Term last, obtained a rule pursuant to the leave reserved, on the grounds, —first, that the charges in question were not within the clause in the policy respecting suing and labouring, and that no other part of the policy was applicable to the case,—secondly, that the custom alleged was a universal custom, and not a custom of any particular place or trade,—thirdly, that there was no evidence that the alleged custom prevailed in Liverpool at the time the policy was made. * * *

"WILLES, J. This was an action upon a policy of insurance for 2000£ from South America to the United Kingdom. The vessel procured a charter from the Chincha Islands to the United Kingdom, loaded a cargo of guano there, and on going round Cape Horn suffered damage so serious that she had to put into Rio, where she was abandoned, and, it must be taken for the purposes of this case, was totally lost. The cargo, however, was transshipped into another vessel and sent home, and the chartered freight, or an amount equivalent to the chartered freight, according to the construction to be put on the matter, exceeded the expense of transshipment, and the freight from Rio to Liverpool was received by the assured. The action was brought by the assured to recover the expenses of transshipment and forwarding.

"At the trial, evidence was given to show that the warranty in the policy on which the question turned was not considered applicable to the circumstances. The warranty was, 'free from particular average; also from jettison, unless the ship be

stranded, sunk, or burned,' neither of which happened.

"The evidence given was for the purpose of showing that the charges of transshipping and forwarding had been considered to be what was called technically 'particular charges,' and not particular average so as to be within the warranty. The verdict passed for the plaintiff's affirming the existence of the usage at the time when the policy was made, subject to leave reserved to the defendants to move to enter a verdict, which they accordingly did; and that rule was discussed last term before the Chief Justice and my Brothers Keating, Montague Smith, and myself, when we took time to consider. At the sittings after term we discharged the rule, not stating our reasons, but promising to do so during this term; and that promise I am now about to fulfill.

"Many points were made upon the argument of this rule; upon one of which only is it necessary to pronounce an opinion. That turned upon the construction of the suing and labouring clause in the policy; and it may be considered under the following heads,—first, whether the **[74]** expenses incurred were of a character to be within the clause,—secondly, whether the occasion upon which they were incurred were such as to be within it,—thirdly, whether if it was such, the application of the clause is excluded by the warranty against particular average.

"As to the first question, it was hardly disputed that the expenses incurred were of a character to be within the clause. Without incurring them the

subject-matter of the insurance never would have had any complete existence. They were incurred in order to earn it; and they represented so much labour beyond and besides the ordinary labour of the voyage, rendered necessary for the salvation of the subject matter of insurance, by reason of a damage and loss within the scope of the policy, the immediate effect of which was that the subject matter insured would also be lost, or rather would never come into existence, unless such labour was bestowed. As the goods lay at Rio, no part of the chartered freight had accrued due, and no freight even *pro rata itineris* could have been claimed by the shipowner. His only right in respect of the charter freight was to detain the goods for a reasonable time in order to send them on in another vessel to their destination, and there claim an amount equal to that of the charter freight. In order to do so, labour must be used and expense incurred. It can make no difference whether the shipowner happened to have at the port of distress a vessel of his own which he can employ in this service, in which case the labour of forwarding would be strictly that of himself or his servants, or whether he forwards in the vessel of another shipowner, paying for his labour and that of his servants. Nor can it make any difference, in the application of the clause, whether, as here, the goods are in a port of large resort, or where by reason of the rate of freight a forwarding vessel is easily procured, or whether the vessel becomes a wreck in an out-of-the-way place, and by unusual enterprise and skill

the master is enabled to communicate with a vessel either of his owner or of some other person by which he forwards the cargo to its destination. The amount of labour is different in degree in the two cases; but in each it is a consequence of a peril insured against it; it is incurred in preventing the destruction of nonentity of the subject-matter for which in the event of its loss the underwriters must be answerable. There is in each case a loss or misfortune threatening the safety of the subject-matter of the insurance, and by the operation of which, unless averted by labour, that subject matter will be imperilled and the underwriters may become liable.

"As to the second head,—whether the occasion upon which the expenses were incurred was such as to be within the suing and labouring clause,—this depends [75] upon the true answer to the question so thoroughly discussed in the course of the argument, viz.: whether the clause ought to be limited in construction to a case whether the assured abandons, or may perchance abandon, so that the expense incurred is not only in respect of a subject matter in which the underwriters are interested, but upon property which, by the abandonment, actually becomes, or may become, theirs, or whether it extends to every case in which the subject of insurance is exposed to loss or damage for the consequences of which the underwriters would be answerable, and in warding off which labour is expanded. In the former construction the clause is inapplicable to the present case; in the latter it is applicable, and the assured is entitled to contribution.

"The question manifestly depends upon the construction of the language of the clause; and, quite apart from the proved usage, we think the latter is the true construction. The words of the ordinary suing and labouring clause (to which in this policy is superadded an express provision as to abandonment upon which we need only say in passing that it does not alter the question in favour of the underwriters) are used in the same form as must have been in common use before 1783, when Emerigon published his great work on insurance, in which amongst the various forms of the clause used at different ports, that of the London policy then used is given. (Emerigon, by Boulay-Paty, vol. ii, p. 239.) The words are quite general, and ought to be so construed unless some good reason is given for restraining them,—that, 'in case of any loss or misfortune, it shall be lawful' to 'sue, labour, and travel for, in and about the defense, *safeguard,* and recovery of the subject-matter,' 'without prejudice to this *insurance'* (not abandonment, as in the French Ordonnance hereafter cited), 'the charges whereof the said company will bear,' 'in proprotion to the sum hereby insured' (not the amount saved, as in the French Ordonnance). Up to this point, there is not a word about abandonment; and this is the whole of the usual clause. The meaning is obvious, that, if an occasion should occur in which by reason of a peril insured against unusual labour and expense are rendered necessary to prevent a loss for which the underwriters would be answerable, and such labour and expense is incurred accordingly, the underwri-

ters will contribute, not as part of the sum insured in case of loss or damage, because it may be that a loss or damage for which they would be liable is averted by the labour bestowed, but as a contribution on their part as persons who have avoided detriment by the result in proportion to what they would have had to pay if such detriment had come to a head for want of timely care. Take, for instance, the case of a policy on goods warranted free of average under 5 per cent and the goods are wetted in a storm which drives the ship into a port of distress, where by drying at an expense less than 5 per cent the goods might be saved or damaged **[76]** under 5 per cent, whilst, if not dried, they would decay and become damaged over 5 per cent, though existing in specie, so that freight would be payable. In this case there is no abandonment, and may be no prospect of one; and yet it is the duty of the master to use all reasonable means to preserve the goods, and obviously for the interest of the underwriters to encourage him in the performance of that duty by contributing to the expense incurred. Not only the generality of the words, but also the subject matter to which they relate, therefore, point to the application of the clause to all cases in which the underwriter is saved from liability to loss, whether partial or total, and whether an abandonment does or may possibly take place or not.

"There remains to be considered, thirdly, whether the application of the suing and labouring clause is excluded in this particular case by the warranty against particular average,—'warranted free from

particular average, also from jettison, unless the ship be stranded, sunk, or burnt.' And this depends upon whether the expression 'particular average' in this context, and construed, according to the golden rule, by what goes before and follows in the policy, includes expenses which fall within the suing and labouring clause, so that in effect the suing and labouring clause is expunged by the warranty.

"This is a question the answer to which involves most important consequences, because, if the warranty against particular average, or, to use a more accurate expression with the same meaning, the warranty against total loss only, excludes the operation of the suing and labouring clause even where an impending total loss is averted by extraordinary exertion and expense, it must be because the word 'average' has some fixed and definite meaning so rigid and inelastic that it cannot be modified or limited so as to apply to loss of or damage to the thing insured (the sense in which it has been hitherto understood by average-staters); but that it must needs also include contribution to any labour incurred in the defense and safeguard of the thing insured, so that even an express clause left standing in the policy with reference to such labour, the suing and labouring clause) must be rejected as inconsistent with the warranty. If this be so, it must equally be true of all memorandum goods which are warranted free from average under a certain percentage; and the operation of this would be so general, if not universal, that the suing and labouring clause would be confined to the cases excepted in the memoran-

dum alone. Two results would follow, both novel in practice, and one at least very remarkable.

"The first would be unfavorable to the underwriters in a novel way, because the memorandum was framed to protect the underwriters from frivolous demands in respect of small losses which are most likely to have arisen from natural deterioration or wear and tear. The exception of [77] stranding tends to show that this was the scope of the memorandum; for, it is the exception of such a loss as makes it probable that the deterioration of the goods, though under the given percentage, was nevertheless not to be attributed to the perishable nature of the goods themselves. Accordingly, the rule has been, to pay for damage to memorandum articles only where it exceeded the specified percentage, and not to allow this percentage to be eked out by expenses falling within the suing and labouring clause. Thus, in the case already out, of goods wetted by a storm, the amount of expenses reasonably incurred in preserving the goods is, according to the present practice, contributed to under the suing and labouring clause, however small in the result be the loss or damage to the goods; and the loss of or damage to the goods is paid if it amount to the stipulated percentage, but not otherwise; and the amount of expenses is not added in order to make up that percentage. Thus, if the agreed percentage be 5 per cent and the expenses amount to 2 per cent, and the loss or damage to 3 per cent, only the expenses are paid, and not the average. But, if we hold that the warranty excludes the application of the suing and

labouring clause, the whole must be paid, and the underwriters will be exposed to the very inconvenience which the memorandum has been supposed to obviate.

"Upon the other hand, if the expenses should be less than the percentage, and a loss is thereby prevented either altogether or to an extent less than the percentage; as, if, in the case put, the expenses were 3 per cent and the damage only 1 per cent, according to the present practice the underwriters would pay the expenses; but, if we decide for the present defendants, the underwriters, though saved from loss, would be altogether exempt from contribution.

"In our view, however, we are not compelled to adopt so inconvenient and unpractical a conclusion. The word 'average,' so far from being a term of art (except in so far as according to the evidence usage may have limited its meaning to loss or damage to the goods themselves), or a word with a rigid or unchanging signification necessarily including expenses in the defense or safeguard of the subject-matter insured, is a word used in a great variety of phrases as applicable to different subjects-matters, and not with any fixed or settled application. It would be tedious to go through the various uses to which it is applied; and we need not do more than refer to the instances cited in argument, and more especially to the very learned note of Mr. Maclachlan in Arnould on Insurance (1). Amongst the

(1) 3d ed., vol. ii, p. 739.

various uses to which the word has been applied, no doubt, that of 'small [78] expenses' is one, as in the usual clause in a charter-party. So, in the case of insurance itself, expenses must often be taken into account in determining whether there has been a loss or not, but only because a thing is lost in insurance law which cannot be got back except at an expense equal to its value when recovered.

"The question here, however, is not as to the extension of which the term 'average' is capable, but of the sense in which it ought to be understood in the particular context with which it is to be reconciled, and if possible read so that effect may be given to every provision in the instrument. Nor is it to be forgotten that the suing and laboring clause, which for the reasons already given specifically provides for this case, has been allowed to remain a part of the policy; and that a special provision as to a particular subject matter is to be preferred to general language, which might have governed in the absence of such special provision. *'Generalia specialibus non derogant.' 'Specialia generalibus derogant.'*

"In our opinion, quite apart from usage, the true construction of the policy, as reconciling and giving effect to all its provisions, is, that the warranty against particular average, does no more than limit the insurance to total loss of the freight by the perils insured against, without reference to extraordinary labour or expense which may be incurred by the assured in preserving the freight from loss, or rather from never becoming due, by reason of the operation of perils insured against; and that the latter ex-

penses are specially provided for by the suing and labouring clause, and may be recovered thereunder.

"Much reliance was placed, for the defendants, upon two recent decisions which are said to have determined that there could be no liability under the suing and labouring clause where there was none under the policy; The Great Indian Peninsular Railway Company v. Saunders, and Booth v. Gair, the first of which cases was decided before and the other after the date of the present policy.

"Before these decisions, the liability of the underwriters appears to have been universally admitted and acted upon even in the cases where the expenses were incurred to forward goods existing in specie at the port of distress, and warranted free from particular average, so that no liability could accrue to the underwriters by their not being forwarded.

"Probably the underwriters, up to the time of the first of these decisions, thought it so important to encourage honest efforts to preserve and forward the cargo, or otherwise to preserve the subject-matter of insurance, that they preferred paying in all unsuspicious cases, without nice inquiries as to whether the expenses had in particular instance averted liability. In so doing, they not only acted with liberality, but no doubt also best studied their own interests; and, whilst they calculated [79] the premium so as to include a remuneration for the extra liability which they were satisfied to bear, they probably at the same time found that the encouragement to fair dealing thereby afforded was their best

security against the more serious losses that might arise from neglect of precautions of which the expense was thrown upon the assured.

"This practice, however, could not prevail to alter or enlarge the application of the suing and labouring clause; because, though usage may impose a meaning upon a word such as 'average,' it cannot alter the rules of construction; and, in the cases referred to, the decision and the sole decision was, that freight and other expenses of forwarding from a port of distress to the port of destination goods warranted free of particular average, under circumstances under which the underwriters could not have been liable if the expenses were not incurred, was not within the true intent and meaning of the suing and labouring clause, which in the context of a policy of insurance could only extend to suing and labouring by means of which the underwriters might obtain a benefit.

"In the Great Indian Peninsular Railway Company v. Saunders, the goods were iron rails for Bombay, shipped to be paid for lost or not lost. They were insured with a warranty 'free of particular average unless the ship should be stranded, sunk, or burnt.' The vessel on her way put into Plymouth, where she was a total loss; but she was not 'stranded, sunk, or burnt.' The rails were saved and sent on by other vessels, and for the freight paid upon such forwarding the underwriters were held not to be liable; and Blackburn, J., in delivering the judgment of the Court, carefully abstained from deciding the question now before us; for, he said: 'It is not neces-

sary to decide whether an underwriter on a policy against total loss only, is, under this clause, liable for expenses incurred by the assured for the purpose of rescuing the subject-matter of an insurance from a state of peril which might have resulted in a total loss, but did not. There are reasons both for and against this stated by Mr. Phillips in his Treatise on Insurance; and the question seems never to have been actually decided. But in the present case it does not arise. The expenses here were incurred for the purpose of forwarding the subject-matter of insurance to its destination at a time when the iron was not in any peril of total loss, either actual or constructive. Had the insured chosen, instead of paying this extra freight, to sell the rails in England, as he might have done if he pleased, he could have made no claim on the underwriters; for, it would not have been a constructive total loss, according to Rosetto v. Gurney, unless the amount of the extra freight exceeded [80] the value of the goods when forwarded, which is not the case here; and an actual total loss is out of the question.' That judgment was affirmed in the Exchequer Chamber, where Erle, C. J., in like manner, delivering the judgment of the Court, said: 'The expenses that can be recovered under the suing, labouring, and traveling clause are expenses incurred to prevent impending loss within the meaning of the policy. Now, here, the goods were given up to the plaintiffs in perfect safety; and the question is, were those expenses incurred to prevent a total loss? Had the owners a right, when the goods were given into their

possession, to turn the transaction into a total loss? Certainly not; for, they had their goods in specie, and consequently that £825, 11s. 7d. had no reference to suing, labouring, or travelling to prevent such a loss.'

"That case was followed by Booth v. Gair, in which bacon was insured upon a voyage from Liverpool to New York, "free from average unless general or the ship were stranded, sunk, or burnt.' The vessel, on her way, by perils of the sea, but without being stranded, sunk, or burnt, became disabled, and put into Bermuda, where she was constructively totally lost. The bacon was landed in specie, and was not totally lost, constructively or otherwise. No expenses appear to have been incurred in saving the goods from a total loss, which was negatived; but certain expenses were incurred in the way of extra freight, transshipment, warehousing, surveying, and cooperage, all of which were treated as expenses of forwarding the goods. It was further proved that it was the practice of underwriters on goods to pay such expenses under like circumstances, under the name of particular charges. The judgment was for the underwriters, upon the ground stated by Erle, C. J., viz., that 'what the master did was in discharge of his duty in ordinary course, and there was no peril creating a risk of a total loss from which the underwriter was saved by the expenses in question. There were no other perils than such as are always attendant on the transit of goods by the voyage in question.' No notice appears to have been taken of the practice of underwriters, probably for the rea-

son already mentioned, that, although usage may give to the words 'average,' 'particular average,' or 'average unless general,' a conventional meaning, so as to make them include partial loss or damage of the subject-matter only, and not what are known as 'particular charges,' which fall within the suing and labouring clause, yet such usage could not control the construction of the policy, by which that clause must be limited in application to cases in which the underwriter might incur liability, and therefore might derive a benefit from the extraordinary exertion. That is the circumstance which distinguishes these cases from the present,—that the usage of underwriters already brought to the attention of the Court in Booth v. Gair could not affect the decision in that case. These decisions, therefore, are inapplicable to the present case, and, when examined, prove to be anything but authority for the defendants. [81]

"Passages from Emerigon were cited by the defendants' counsel, and much relied upon, in which a contrary opinion is supposed to have been expressed to that upon which we found our judgment. In chapter 12, s. 41, vol. i., p. 600, Boulay-Paty's edition, treating of general and particular average as between the owner of ship, freight, and goods, he says: 'Les frais faits pour sauver la marchandise sont avaries simples pour le compte des proprietaires.' He is not there giving an opinion upon the construction of the policy. He refers, however, to the 17th chapter, s. 7, for a discussion of the question of liability as between the insurers and the assured,

either with or without a suing and labouring clause; and in that, which is the part of the work applicable to the present subject, he throughout treats the question as depending upon the very words of the suing and labouring clause.

"Nothing can make this more clear than a reference to his treatment of the question: 'Si les frais de sauvetage excedant la valeur des effets sauves, cet excedant est il a la charge des assureurs?' To which he answers: 'Suivant les clauses inserees dans les formules de diverses places de commerce, les assureurs, independamment des sommes par eux assurees, sont tenus de payer l'excedant des frais de sauvetage'—Vol. ii., p. 238. He then sets out the forms of the suing and laboring clauses used at Antwerp, Rouen, Nantes, and Bordeaux; and he refers to a similar and more ancient one to be found in Loccenius, p. 981, by which the underwriters undertake for expenses incurred in the safeguard of the goods, even though no benefit should follow: and he remarks thereupon: 'Par ces formules les pouvoirs les plus libres sont donnes a l'assure et a ses representants, afin de les inviter a travailler au sauvetage, sans etre arretes par la crainte d'en supporter euxmemes les frais; mais les assureurs, en souscrivant pareils pactes, contractent a l'aveugle un engagement donc less consequences sont indefinies.'

"He then gives the London form of suing and labouring clause as then and still used; and he proceeds to say that the Marseilles policy (with which he was so familiar) contained nothing of the sort, and that an express authority to sue and labour was

necessary in order to charge the Marseilles underwriters with the expenses.

"This view, so far as it bears upon the present argument, is in accordance with the view of the London average-staters, and favours a distinction between loss and damage to the thing assured, and expenses incurred in its protection, and a separate provision for the latter.

"In fact, the key to the French authorities is to be found in the positive law of France upon the subject, by which, in the absence of express contract, contribution on the part of the underwriters was enforced in the cases of the greater perils of shipwreck or stranding, and then only to the value of the property saved for the underwriters. [82] Thus, by the Ordonnance de la Marine of 1681 (Liv. iii., tit. 6, art. 45),—'En cas de naufrage ou echouement, l'assure pourra travailler au recouvrement des effets naufrages, sans prejudice des delaissements qu'il pourra faire en temps et lieu, at du remboursement de ses frais dont il sera cru sur son affirmation jusqu'a concurrence de la valeur *des effets recouvres.*' This is followed closely, though not exactly, by the Code de Commerce, art. 381, with the difference that the latter, by using the word 'doit' instead of 'pourra,' makes such exertions the duty, and not merely the privilege, of the assured.

"Read by the light of this text of the Ordonnance, the views of Emerigon, so far from being opposed to, are in favour of the construction which we adopt.

"Hitherto we have only adverted in passing to the evidence and the finding of the jury upon the under-

stood meaning in the business of marine insurance of the phrase 'particular average.' If necessary, we should have been prepared to hold that the evidence established such an understood meaning, according to which 'particular average' does not include 'particular charges,' and to act upon such usage as equally sacred with the express part of the contract.

"It is needless, however, to enlarge upon this part of the case, because, upon the facts proved, and the true construction of the policy itself, we have, for the reasons already given, come to the conclusion that there was a danger of the total loss of the freight by reason of the loss of the ship by perils insured against; that the measures taken by the plaintiff to avert that loss, and the expense incurred therein, were taken and incurred for the benefit of the underwriters, in averting a loss for which they would have been liable; and so that they were within the suing and labouring clause, and that the underwriters are liable to contribute thereto. It is satisfactory, however, to think, that, in arriving at this conclusion upon the meaning of the contract into which the defendants have entered, we are deciding also in accordance with the approved usage of commerce.

"The verdict for the plaintiffs was therefore right, and the rule to enter the verdict for the defendants is discharged."

Mr. FRANK.—Along that same line, and as proof of the usage, I call attention now to the case of Bid-

dell Bros. v. Clemens Horst Co., 16 Commercial Cases, and what I am going to read is on pages 202 and 203. That case dealt with the necessary proof of a custom or usage. There the court had imported into the case a custom or a usage, or taken judicial notice of it, and this is upon [83] that subject, and incidentally shows how the custom or usage is to be proven. * * * This is the point of it, that the English Court holds that when a custom or a practice has once been proved in a court of law, it then, by virtue of that proof, becomes a part of the mercantile law of that country. That is the point, and that is the reason I am calling attention to this.

Mr. CAMPBELL.—I don't dispute that proposition.

Mr. FRANK.—You do not. Then I will stop on that right here. That is admitted. * * * I think I will read just one paragraph and with that admission we will let the rest of it go.

Mr. Frank then read as follows:

"When it is said that mercantile law is acted upon by the courts without proof of usage, this means after it has in earlier cases been proved and adopted.

"I am not forgetting that in some cases classic legal authorities have been recognized as sufficient evidence of mercantile usage, especially international usage. But even then the authority is in terms recognized as sufficient evidence before the Courts give judgment recognizing the usage; but no such evidence was referred to in this case. It seems clear on the authorities that the law merchant must

be proved as a fact in the sense that the mercantile usage which is recognized as part of the law merchant must be proved, and the fact must, to use the words of Wilmot, J., in Edie v. East India Co., be reiterated. Once thus recognized the usage becomes part of the law of England and not a mere local usage or custom. Again, Lord Campbell in the House of Lords, in Brandao v. Barnet says: 'When a general usage has been judicially ascertained and established, it becomes a part of the law merchant which Courts of Justice are bound to know and recognize. Such has been the invariable understanding and practice in Westminster Hall for a great many years; there is no decision or dictum to the contrary, and justice could not be administered if evidence were required to be given *toties quoties* to support such usages, and issue might be joined upon them in each particular case."

Whereupon, the plaintiff rested its case. [84]

Mr. Campbell, on behalf of the defendant, then offered in evidence the case of

Taylor v. Dunbar, IV Common Pleas L. R. 206, to which offer the plaintiff objected, on the ground that the offered evidence is not pointed to any of the issues in the case; that this is not a loss that is claimed for delay, but a loss which is claimed because of a direct expenditure as a result of the peril insured against; which objection having been overruled, said case was put in evidence, and is as follows:

"KEATING, J.—Mr. Beasley has referred us to every authority which could at all favour the view

he wished to present; but they do not, in my opinion, go far enough to sustain his argument. The facts stated in the case show beyond a doubt that the proximate cause of the loss of the meat was the delay in the prosecution of the voyage. That delay was occasioned by tempestuous weather; but no case that I am aware of has held that a loss by the unexpected duration of the voyage, though that be caused by perils of the sea, entitles the assured to recover upon a policy like this. I think we should be establishing a dangerous precedent if we were to give effect to Mr. Beasley's argument, seeing that there are so many cargoes which are necessarily affected by the voyage being delayed. I am not disposed to create such a precedent. I think our judgment ought to be for the defendant.

"MONTAGUE SMITH, J.—I am of the same opinion. The loss here has arisen in consequence of the putrefaction of the meat from the voyage having been unusually protracted. That is a loss which does not fall within any of the perils enumerated in this policy. To render the underwriters liable, it must be shown that the loss is proximately due to one of the known perils. Retardation or delay of the voyage is not one of them. The case states that the meat was not affected by the sea or by the storm. It was not, therefore, as Mr. Beasley wished us to assume, damaged by knocking about. If it had been, the case might have been brought within the principle of Lawrence v. Aberdein, and Gabay v. Lloyd. But the statement in the case [85] precludes us

from drawing any such inference. If we were to hold that a loss by delay, caused by bad weather or the prudence of the captain in anchoring to avoid it, was a loss by perils of the sea, we should be opening a door to claims for losses which never were intended to be covered by insurance, not only in the case of perishable goods, but in the case of goods of all other descriptions. By the common understanding both of assured and assurers, delay in the voyage has never been considered as covered by a policy like this. I therefore agree that our judgment should be for the defendant.

"Brett, J. I am also of opinion that damage to goods caused by delay of the voyage, though the consequence of stormy and tempestuous weather, is not one of the perils covered by an ordinary policy. Such damage must have occurred many times, and yet no trace is to be found of such a claim being maintained. If it be desired, a clause may easily be inserted in the policy to meet the case.

Mr. FRANK.—Now, that your Honor has heard the case read, I move to strike it out as being immaterial and incompetent and having no bearing whatsoever on the issues in this cause. That simply holds that the proximate cause of the loss must be insured against. That is all it holds.

The COURT.—The motion will be denied.

Mr. Campbell then offered and read in evidence, on behalf of defendant, the case of

Bink and Others v. Fleming, 25 Q. B. D. 396,

to which offer the plaintiff objected, on the ground that the offered evidence is not pointed to any of the issues

in the case; that this is not a loss that is claimed for delay, but a loss which is claimed because of a direct expenditure as a result of the peril insured against; which objection having been overruled, said case was put in evidence, and is as follows: [86]

"Lord ESHER, M. R.—It is well settled that by the law of England there is a distinction in this respect between cases of marine insurance and those of other liabilities. In cases of marine insurance the liability of the underwriters depends upon the proximate cause of the loss. In the case of an action for damages of an ordinary contract, the defendant may be liable for damage, of which the breach is an efficient cause or *causa causans;* but in cases of marine insurance only the *causa proxima* can be regarded. This question can only arise where there is a succession of causes, which must have existed in order to produce the result. Where that is the case, according to the law of marine insurance, the last cause only must be looked to and the others rejected, although the result would not have been produced without them. Here there was such a succession of causes. First, there was the collision. Without that no doubt the loss would not have happened. But would such loss have resulted from the collision alone? Is it the natural result of a collision that the ship should be taken to a port for repairs, and that the cargo should be removed for the purposes of the repairs, and that, the cargo being of a kind that must be injured by handling, it should be injured in such removal? A collision might happen without any of these consequences. If it had not been for the re-

pairs, and for the removal of the cargo for the purpose of such repairs, and for the consequent delay and handling of the fruit, the loss would not have happened. The collision may be said to have been a cause, and an effective cause, of the ship's putting into a port and of repairs being necessary. For the purpose of such repairs it was necessary to remove the fruit, and such removal necessarily caused damage to it. The agent, however, which proximately caused the damage to the fruit was the handling, though no doubt the cause of the handling was the repairs, and the cause of the repairs was the collision. According to the English law of marine insurance only the last cause can be regarded. There is nothing in the policy to say that the underwriters will be liable for loss occasioned by that. To connect the loss with any peril mentioned in the policy, the plaintiffs must go back two steps, and that, according to English law, they are not entitled to do.

"For these reasons I think that the judgment of Mathew, J., was right. The case of Taylor v. Dunbar seems to me to have been decided upon substantially the same view as that which I have endeavored in somewhat different terms to state, and it appears to me to be really an express authority in favour of our decision. With regard to the American [87] authorities, the American law on the subject seems to differ materially from our law, and therefore it is not necessary to consider them.

"LINDLEY, L. J. It appears to me that the judgment of Mathew, J., was correct. It has long been the settled rule of English law with regard to

marine insurance that only the *causa proxima* or immediate cause of the loss must be regarded. The rule is well known, and people must be taken to have contracted on that footing. In principle the case appears to me to be governed by the decision in Taylor v. Dunbar. The evidence shows that the damage to the fruit was due to the joint operation of the handling and the delay. When the policy is looked at, there are no words applicable to a loss occasioned by these causes.

"BOWEN, L. J. I am of the same opinion. Whether we consider the damage occasioned by the delay or that occasioned by the handling of the fruit, the same principle appears to apply. The proximate cause of the loss was not the collision or any peril of the sea. It was the perishable character of the articles combined with the handling in the one case, and the delay in the other. The case appears to me to be undistinguishable in principle from Taylor v. Dunbar. For these reasons, I think the appeal should be dismissed."

Mr. FRANK.—Now, that your Honor has heard the case read, I move to strike it out as being immaterial and incompetent and having no bearing whatsoever on the issues in this cause. That simply holds that the proximate cause of the loss must be insured against. That is all it holds.

The COURT.—The motion will be denied.

Mr. Campbell then offered and read in evidence the case of

The Great Indian Peninsula Railway Company v. Sounders, 2 Best & Smith Rep., Q. B. 266,

as follows:

"ERLE, C. J. I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

"This is an insurance on goods 'warranted free from particular average'—in effect an insurance against a total loss. According to the statement before us, the facts are these. The [88] carriage of the goods was prepaid, amounting to 629 £. 9 s. 10 d.; the ship, sailed, and, having been damaged, was taken into an intermediate port under circumstances which constituted a constructive total loss of the ship; but the cargo was landed and delivered to the plaintiffs who were the owners of it, and by them taken to its destination in a state undamaged by sea in any way. After the happening of this misfortune to the ship, the plaintiffs paid 825 £, 11 s. 7 d. more for the new voyage; and they now seek to recover this latter sum, or the difference between the two sums, from the insurer; and the question is, are they entitled to do so?

"It is certain that the plaintiffs cannot recover here as for a total loss of the goods, seeing that the goods were restored to them in specie, and forwarded by them to their place of destination, where, so far as any sea damage is concerned, they may have received full value for them.

"But Mr. James ably argues that the plaintiffs are entitled to recover this money; not as compensation for loss of the goods within the general language of the policy; but as the expense of forwarding them to their destination in other vessels, under what has been called 'the labour and travel clause,' which empowers the assured to sue, labour, and travel to save the thing assured from impending loss. The sub-

stantial ground, however, on which I decide this case is entirely beside his able argument. The expenses that can be recovered under the suing, labouring and travelling clause are expenses incurred to prevent impending loss within the meaning of the policy. Now, here the goods were given up to the plaintiffs in perfect safety; and the question is, were these expenses incurred to prevent a total loss? Had the owners a right when the goods were given into their possession to turn the transaction into a total loss? Certainly not, for they had the goods in specie, and consequently that 825 £ 11 s. 7 d. had no reference to suing, labouring, or travelling in order to prevent such a loss.

"A great part of Mr. James's argument turned on the different meanings of the word 'average.' If it were necessary to go into that point, I should clearly be of opinion that the words found in an instrument in common use should be taken according to the ordinary understanding of them when so used. It is agreed that 'particular average' has two meanings, universally understood—that when taken with reference to the common memorandum clause it excludes certain expenses, but when taken with reference to the money to be paid by the underwriter it includes them. In Arnould on Insurance, vol. 2, 970, sec. 358, 2d ed., it is said that such expenses as these [89] are to be included. But all this is beside the question now before us, as these expenses have nothing to do with the labour and travel clause. I also think that it should make no difference in our judgment whether the freight was prepaid or to be earned.

"For these reasons, and also those given in the Court below, which are quite satisfactory to my mind, and where the difference between this case and the American case of Mumford v. The Commercial Insurance Company, 5 Johns. U. S. Rep. 262, is clearly pointed out, I am of opinion that the defendant is entitled to our judgment."

The following proceedings were then had:

Mr. CAMPBELL.—Before proceeding, if the Court please, I should like to refer your Honor to the decision of the Circuit Court of Appeals for this circuit in

Maritime Insurance Company v. M. S. Dollar Co.,

in which the Court comments upon the procedure to be followed in cases of this character involving questions of English law.

(Continuing.)—I think it can be read from the case as pointed out that under a contract of marine insurance to be governed by English law, it is the duty of the Court to instruct the jury as to what the law of England is; that it is not a question of fact to be left to the jury.

The COURT.—That was my understanding of it, but the anomalous method, however, is permitted of submitting this so-called evidence of judicial decisions to the jury. It shows the application of what I suggested at the opening of this trial, that it is not a case for a jury at all, where the only question is a question of the English law.

Mr. FRANK.—In view of the repeated suggestions of the Court regarding that matter, and with-

out desiring to take any particular exception to them at this time, although I think it [90] is open to exception, I am willing at this time to withdraw the case from the jury and submit it to the Court.

Thereupon a written stipulation was made by both parties and filed, waiving a jury. The jury was discharged and the trial then proceeded before the Court without a jury.

Mr. Campbell then offered and read in evidence

Gow v. Marine Insurance, p. 186,

as follows:

"There are certain expenses connected with a vessel's putting into a port of refuge in distress, such as warehousing, reshipping, and forwarding charges. These when incurred by the shipowners have always been charged by him against the cargo, and are admitted by law in certain cases as properly chargeable. Underwriters agreed to assume responsibility for their proper proportion of such charges, and this arrangement was embodied in what was known as the 'forwarding clause':—

"To pay warehousing, forwarding, and other special charges if incurred.

"But *special charges if incurred* might be much too comprehensive a phrase; an attempt might be made to include under it such charges as distance freight payable to a foreign ship condemned at an intermediate port, and other expenses such as would not be recovered under an ordinary English 'clean' policy (i. e. policy consisting simply of the common text and the memorandum). To prevent any such incidence on underwriters of amounts not already at

their charge, the words 'if incurred' were omitted, and the clause was completed with the phrase 'for which underwriters would otherwise be liable,' where 'otherwise' means 'by some provision of the policy different from the clause now under discussion.' The forwarding clause thus stood:

"To pay any special charges for warehouse rent, reshipping, or forwarding, for which underwriters would otherwise be liable."

Mr. Campbell next offered and read in evidence Rule 12 of the Rules for the Construction of a policy, in the English Marine Insurance Act of 1906, as it appears in

Chalmers and Owens Marine Insurance Act, (2d ed.), p. 160, [91]

as follows:

"The term 'all other perils' includes any perils similar in kind to the perils specifically mentioned in the policy."

Mr. Campbell then offered and read in evidence subdivision (b) of Section 55 of The Marine Insurance Act of 1906, as follows:

"Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against."

Mr. Campbell then offered and read in evidence the case of

Greer v. Poole and Others, 5 Q. B. Div. 272.

to which offer the plaintiff objected, on the ground that the offered evidence is not pointed to any of the issues in the case; that this is not a loss that is

claimed for delay, but a loss which is claimed because of a direct expenditure as a result of the peril insured against; which objection having been overruled, said case was put in evidence, and is as follows:

"LUSH, J. This is an action on a marine policy on goods on a voyage from Lagos to Marseilles in a French ship. By the terms of the policy general average was to be payable as per judicial foreign statement.

"The ship having come into collision with another ship put into Gibraltar for repairs. The cargo was undamaged. The master not having funds enough to do the necessary repairs, took up a loan on bottomry upon ship, freight, and cargo. On arrival at Marseilles the bondholder took proceedings to enforce his rights against ship, freight and cargo, and ship and freight proving insufficient to satisfy the bond, the plaintiff had to pay the deficiency in order to release his goods. A judicial average statement was made out at Marseilles, which, however, did not comprise the sum paid to the bondholder, as the payment had not then been made. The defendants paid into court a sum sufficient to satisfy the claim for particular charges and expenses and general average under the adjustment, and the only question submitted to us is whether the amount paid to release the goods is recoverable under the policy. On the argument, Mr. Cohen, who appeared for the plaintiff, feeling that [92] he could not sustain the claim as general average, contended that this was under the particular circumstances a loss by perils of the sea, the circumstances relied on being that the French law entitled

the owner of the vessel in question to abandon the ship and freight to the bondholders and thus to release himself from further liability, the French law differing in this respect from English law. Whether this contention is well founded or not is not in our opinion material; for, supposing it to be so, it does not make the loss a loss by perils of the sea. The proximate cause of the loss, to which alone our law has regard, was the inability of the agent of the shipowner to pay off the charge which he had for want of funds at Gibraltar created on the cargo. The goods sustained no sea damage.

"It was further contended on behalf of the plaintiff that, as the policy was upon goods in a French ship, it must be construed as if it had been a French policy, and that under such a policy the loss would have been deemed a loss by perils of the sea.

"Whether a French policy would have been so construed is again immaterial. It is no doubt competent to an underwriter on an English policy to stipulate, if he think fit, that such policy shall be construed and applied in whole or in part according to the law of any foreign state, as if it had been made in and by a subject of the foreign state, and the policy in question does so stipulate as regards general average, but except when it is so stipulated the policy must be construed according to our law and without regard to the nationality of the vessel. Our judgment is therefore for the defendants."

Mr. FRANK.—Now, that your Honor has heard the case read, I move to strike it out as being immaterial and incompetent and having no bearing what-

soever on the issues in this cause. That simply holds that the proximate cause of the loss must be insured against. That is all it holds.

The COURT.—The motion will be denied.

Mr. Campbell then offered and read in evidence the case of

Powell and Another v. Gudgeon, 5 Maule & Selwyn's Reports, 431,

to the admission of which plaintiff objected, and the said evidence was admitted, subject to said plaintiff's objection [93] and exception:

"Lord ELLENBOROUGH, C. J.—Emerigon, whose name has been so frequently mentioned in the course of the argument, is entitled to all the respect which is due to a very learned writer in discussing a subject with great ability, diligence, and learning, and adverting to all the authorities relating to it, but, still, his opinion, like the opinion of any other learned man, is fallible; and, in the present instance, it is founded on a great many ordinances which do not govern our decisions. Laying out of the case the opinions of foreign jurists, and all which does not properly bear on the point in question, I am inclined to think the damage in this case is to be considered as not arising immediately from a peril of the sea, although in a remote sense, it may be said to have been brought about by a peril of the sea; but our rule of construction is, *causa proxima non remota spectetur*. The injury to the assured was caused by the sale of their goods; but no one will contend that the sale was an immediate consequence of a peril of the sea. The peril of the sea damaging the ship rendered

it innavigable; to restore its navigability a refitment became necessary. The captain, who was interested in and bound to have the ship in a navigable state, being unable to raise the means for refitting her, was obliged to apply to the owners of the goods for a loan, through the medium of a sale of part of the goods. It was therefore a sort of forced loan which was the proximate cause of loss to the owners from the sale of their goods. This was indeed connected with a peril of the sea, because a peril of the sea occasioned damage to the ship, which made repairs necessary, and funds to provide these repairs; but it was the want of funds *aliunde* which obliged the captain to have recourse to a sale of the goods. In conformity, therefore, to the rule that the proximate cause, and not that which is remote, is to be looked to, I think the underwriter is not liable. Giving the largest construction to the general words 'perils of the seas,' I think this is not a case of immediate loss by perils of the seas. Without going into an inquiry how far this resembles the case of jettison, or of general average, the discussion of which might raise future doubts, I say that perils of the sea are too remote a cause of the present loss to make the underwriter liable.

"BAYLEY, J. I am entirely of the same opinion. It does not appear to me that this was a loss by a peril of the sea, or such as entitled the assured to recover, under the general words of the policy; but a loss for which the owners of the goods will be entitled to be reimbursed by the owner of the [94] ship. The owner of the ship undertakes to have the ship fit to perform her voyage; and in case of accident, it is

the duty of the owner, and the master in place of the owner, to provide for its repair. I consider it as a rule applicable to the construction of policies, that the Court must look to the immediate cause of loss, in order to ascertain whether it be a loss within the policy. The loss here was occasioned by the act of the captain, who disposed of the goods, in order to provide himself with funds for the repair of the ship. If he could have raised these funds in any other way, he would not have taken the goods. To hold this a loss for which the underwriter is responsible, would be to make his liability depend upon the accident of the captain's being unable to provide funds for the repair, except by means of the goods. In the case of jettison the immediate cause of loss is a peril of the sea. When the whole is likely to be swallowed up by the sea, the law of jettison allows a part to be sacrificed to save the rest. Inasmuch, therefore, as we are bound, according to the common rule for the construction of policies, to look to the immediate cause of loss, and as this loss was not immediately caused by a peril of the sea, but by the inability of the captain to procure a fund for the repairs, which he was bound to do, it seems to me that this was not a loss within the policy.

"ABBOTT, J. I am also of opinion that the plaintiffs are not entitled to recover. Cases of this kind, where a sale of part of the cargo has been made under circumstances like the present, must, as I should think, have occurred frequently; and if by the law of England the underwriters had been considered as liable, we should probably have found some trace

of it in the books, whereas this appears to be the first action in which an attempt has been made to charge the underwriter. I very much doubt, whether, in the true and legal sense of the word, these goods can be considered as lost to the owner; but it is not necessary to enter upon that inquiry; as I am satisfied, upon the grounds stated by my Lord and my Brother Bayley, that the cause of loss is too remote."

Mr. Campbell next offered and read in evidence the case of

Livie v. Janson, 12 East's Reports, 647,

which said evidence was admitted subject to the plaintiff's objection and exception, as follows: [95]

"Lord ELLENBOROUGH, C. J. As there is some novelty in the point, we will look further into it; though as it appears to me, this case falls within the general principle, that *causa proxima et non remota spectatur.* It therefore seems to be useless to be seeking about for odds and ends of previous and partial losses which might have happened to a ship in the course of her voyage, when at last there was one overwhelming cause of loss which swallowed up the whole subject-matter. At present, I own the case appears to me to be neither an average nor a total loss within the terms of the policy. But we will consider further of it.

"The case stood over till the end of the term, when his Lordship delivered the judgment of the Court upon it.

"This was an action on a policy on ship and goods, warranted free from American condemnation. The ship and goods were damaged by the perils of the

sea, and were afterwards seized by the American Government, and condemned; and the question is, whether the total loss by subsequent seizure and condemnation takes away from the assured the right to recover in respect to the previous partial loss by sea-damage? And upon consideration, we think that it does. It is to be recollected that nothing is properly imputable to the sea-damage but the deterioration of the ship and cargo; for though such sea-damage might stop the progress of the voyage, and so bring the ship and cargo within the reach and effect of some other distinct peril which they might otherwise have escaped, yet the substantive loss by that latter peril is imputable to such latter peril only, not to the previous sea-damage. If for instance, a ship meet with sea-damage, which checks her rate of sailing, so that she is taken by an enemy from whom she would otherwise have escaped; though she would have arrived safe, but for the sea-damage, the loss is to be ascribed to the capture, not to the sea-damage; and this upon the principle that *causa proxima non remota spectatur*. The case of Green v. Elmslie which was cited in the argument, proceeds upon a similar principle; there, the ship would not have been captured, had she not been driven by stress of weather upon the enemy's coast; and yet the loss was held imputable to the capture, and not to the perils of the seas, which had driven the vessel within the influence of the peril of capture. Considering the deterioration of the ship and cargo then as the extent of what is referable to the head of sea-damage, we think we may lay it down as a rule, that where the

property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the [96] ground of a claim upon the underwriters. The object of a policy is indemnity to the assured; and he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against. If the property, whether damaged or undamaged, would have been equally taken away from him, and the whole loss would have fallen upon him had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged? To put another instance to the same effect: supposing ship and cargo to be damaged in the early part of a voyage by the ordinary sea perils, and afterwards wholly destroyed by fire before the voyage is finished; of what consequence to the owner is the damage which may have occurred from one or several successive causes of injury before the fire? And if the property, whether undamaged or not, would have been equally annihilated; is not its previous deterioration rendered wholly immaterial? The object of insurance is that the thing insured shall arrive safe at the place of destination, and that if it do not arrive at all, in consequence of any of the perils insured, the assured shall recover as for a total loss; and that if it arrive damaged, a proportionable compensation shall be paid for the damage; because in that case the proprietor receives the thing *pro tanto* in a worse condition than he ought to have done; but of what consequence to him is the intermediate condi-

tion of the thing, if he be never to receive it again? If, before the completion of the voyage, it be, as to him and his interests, in a state of utter annihilation, what is it to him whether it had been damaged or not in an anterior part of the voyage, before it became annihilated? It was truly said in the course of the argument, that the American Government were the only persons in this case who were prejudiced by the deteriorated state of the ship and cargo; they obtained it in a less valuable condition on that account than it would otherwise have been to them; but that is their loss, not that of the plaintiffs. There may be cases in which, though a prior damage be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent loss. Actual disbursements for repairs in fact made, in consequence of injuries by perils of the seas prior to the happening of the total loss, are of this description; unless, indeed, they are more properly to be considered as covered by that authority, with which the assured is generally invested by the policy, of 'suing, labouring, and travelling, &c., for, in, and about the defence, safeguard, and recovery of the property insured'; in which case the amount of such disbursements might more properly be recovered as money paid for the underwriters under the direction [97] and allowance of this provision of the policy, than as a substantive average loss to be added cumulatively to the total loss which afterwards incurred in consequence of the sea risks. In the present case, as the immediately operating cause of total loss was one from

which and its consequences the defendant is by express provision in the policy exempted; and as the other antecedent causes of injury never produced any pecuniary loss to the plaintiff; and as there never existed a period of time, prior to the total loss, in which the assured could have practically called on the underwriters for an indemnity against the temporary and partial injury sustained by the property insured; we are of opinion, that such prior partial injury forms in this case no claim upon the underwriters of this policy; and consequently, that the *postea* must be delivered to the defendant."

Mr. Campbell then offered and read in evidence

Section 64 of the English Marine Insurance Act, as follows:

> "(1). A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.
>
> "(2.) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average."

and also

Section 78, Subdivision 3 of the English Marine Insurance Act, as follows:

> "(3). Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and laboring clause."

Mr. Campbell then offered and read in evidence Section 869 of Arnould on Marine Insurance (8th ed.), [98] as follows:

"Another class of losses, which, though not specially enumerated in the policy are nevertheless recoverable thereunder, is that which is embraced under the term 'particular charges.' The distinction between 'particular charges' and 'particular average' was first definitely established in our Courts in Kidston v. Empire Insurance Co., where the jury, after hearing the evidence of several average-adjusters and other witnesses, found that there was in the business of marine insurance a well-known and definite meaning affixed by long usage to the term 'particular average' as distinguished from the term 'particular charges'—viz., that 'particular average' denotes actual damage done to or loss of part of the subject-matter of insurance, but that it does not include any expenses or charges incurred in recovering or preserving the subject-matter of insurance; and that expenses incurred in warehousing and forwarding goods are not 'particular average,' but are termed 'particular charges.'

"Accordingly sec. 64, sub-sec. (2), of the Marine Insurance Act, states that 'expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.' They are recoverable from underwriters when incurred after the arising of a peril insured against, in order to prevent such peril

causing a loss for which the underwriters would be liable, if it were so caused. In this event they are charges incurred 'in and about the defense and safeguard' of the subject-matter of insurance within the suing and labouring clause. In certain cases they may also be recoverable from underwriters, apart from the suing and labouring clause, as losses occasioned by a peril insured against when they have been necessarily incurred in consequence of such a peril—as, for example, expenses of warehousing and forwarding cargo, when a peril insured against has occasioned the necessity of such expenditure.''

Mr. Campbell then offered and read in evidence the case of

Great Indian Peninsula Ry. Co. v. Saunders, 1 Ellis, Best & Smith, Q. B., 41,

which case was also read in evidence by Mr. Frank and is hereinbefore [99] set forth.

Mr. Campbell then offered and read in evidence the case of

Booth v. Gair, 15 Com. Bench Reps., (N. S.) 290,

which case was also read in evidence by Mr. Frank and is hereinbefore set forth.

Mr. Campbell then offered and read in evidence the case of

Kidston v. Empire Marine Insurance Co., 1 Com. Pleas L. R. 535,

which case was also read in evidence by Mr. Frank and is hereinbefore set forth.

Mr. Campbell then offered and read in evidence the case of

Kidston and Others v. The Empire Marine Insurance Company, 2 Com. Pleas L. R. 357, as follows:

"Appeal from the decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendants or a nonsuit.

"The plaintiffs had effected an insurance with the defendants on the chartered freight, valued at £5000, of a ship SEBASTOPOL, on a voyage from the Chincha Islands to the United Kingdom. The policy contained the usual suing and labouring clause, and a warranty against particular average. The ship having been damaged in a storm put in to Rio, where she became totally lost, but the goods were landed and forwarded to their destination in another vessel, the CAPRICE, at a cost of £2467 11s. 10d., and the chartered freight was then paid to the plaintiffs. The action was brought to recover from the defendants a proportionate part of the sum so expended in forwarding the goods from Rio.

"Evidence was given at the trial of the meaning of particular average as understood among merchants.

"The facts are stated at length in the report of the case in the court below * * *

"KELLY, C. B. In this action, which was on a policy upon freight, a question of great importance to the mercantile community has arisen, and has for the first time, at least in this country, received a judicial decision in the Court of Common Pleas, which decision is now under appeal before us, and which we are called upon to affirm or to reverse.

"The facts are few and simple. The plaintiffs chartered the ship SEBASTOPOL from the Chincha Islands to a port in Great Britain, and effected an insurance upon freight for 2000£ by the policy in question, the freight being valued at £5000 [100] and the policy contained a warranty against particular average, with the well-known suing and labouring clause, as adopted in English insurance. The ship sailed from the Chincha Islands, and in rounding Cape Horn became so greatly damaged that she afterwards put into the port of Rio, where she became a wreck, and may be deemed to have been totally lost. The cargo of guano was landed and warehoused, and was afterwards shipped on board a vessel called the CAPRICE, chartered by the plaintiffs, and was forwarded in safety to its destined port in Great Britain, at an expense for freight of 2467£ 11s. 10d.,

"Under these circumstances the plaintiffs brought this action, with a count claiming for a total loss of freight, and another count for 1145£ 3s. 6d. under the suing and labouring clause, for the charges and expenses of conveying the cargo from Rio to this country. It was contended for the plaintiffs that when the ship had become a wreck, and the cargo had been landed at Rio, when no freight could be claimed by the law of England *pro rata itineris,* that a total loss of freight had been incurred; and that inasmuch as the proportion of the homeward freight by the CAPRICE being a charge incurred in preserving the subject-matter of the insurance, and so relieving the defendants, the underwriters, from the

liability as for a total loss of freight, it was a charge within the suing and labouring clause, which the plaintiffs were entitled to recover. On the other hand it was insisted for the defendants that, inasmuch as the plaintiffs were able to forward the goods to England by another vessel, at an amount of freight substantially less than the entire freight, as valued under the policy, a partial loss only, and not a total loss of freight, had been incurred, which the warranty against particular average precluded the plaintiffs from recovering. It was argued that the master was bound, under the circumstances that had occurred, to forward the goods to England; that his ability to do so, and so to earn the whole of the freight, subject to a deduction of the cost of the conveyance from Rio to this country, made the case one of partial and not of total loss, and so within the particular average clause. We are of opinion, however, that upon the ship SEBASTOPOL becoming a wreck at Rio, and the goods having been landed there, inasmuch as no freight *pro rata itineris* could be claimed, a total loss of freight had arisen, and that the expenses incurred in forwarding the goods to England by another ship were charges within the suing and labouring clause, incurred for the benefit of the underwriters to protect them against a claim for total loss of [101] freight, to which they would have been liable but for the incurring of these charges, and that consequently the amount is recoverable under that clause in the policy.

"The question raised by the defendants, whether the owner was bound, under these circumstances to

forward the goods to England, is attended with some difficulty and uncertainty. It has been much considered, and in effect decided, in America. Parsons, on Maritime Law, vol. II, p. 385, lays it down 'that there is a total loss of freight when the ship and cargo are totally lost, or the vessel becomes wholly unnavigable, or is subject to a detention of such a character as to break up the voyage. It is said, in some cases, that if the loss of the ship be only constructively total, that is, made so by abandonment, the owner may abandon also the freight, and claim as for the total loss of it; but if, although the ship itself be wrecked and utterly lost, the master can re-ship and forward the goods by reasonable endeavors and at reasonable cost, we have seen that it is his duty to do so; and if he neglects this duty the insurer is chargeable only in the same way and to the same extent as if the duty had been performed, and the loss will be partial or total according to its amount when so adjusted.'

"It appears in a note that in a case reported, 9 Johnson 17, where the vessel was lost at an intermediate port, but the goods remained and were seized by the government, the underwriters were exempt from loss by seizure in port. It was held that if the goods could have been sent on, but for the seizure, the defendants were not liable. Kent, C. J., said: 'The point is, whether it be a good defense in any case to an action on a policy for freight, that the shipowner refused or neglected to forward the goods by another vessel when he had it in his power. We have not met with any decided case on this point, but it

appears to be reasonable and consistent with the principles of the contract that the insurers should in such case be discharged.'

"This has never been held to be law in this country, but it must be admitted that it is not unreasonable that if the owner of freight insured fails to earn it by any default of his own, he should be disentitled to recover it against the insurer. But it is unnecessary to decide this point; for whether or not a shipowner or charterer be under a legal obligation to forward the cargo by another ship to its destined port he is at all events at liberty to do so, and thus to earn his entire freight, and we think that, under a policy like this, he is entitled to claim the cost which he so incurs under the suing and labouring clause, where such a clause is to be found in the policy, on the ground that he has thereby [102] preserved the subject matter of the insurance from total loss, to which it would otherwise have been liable upon the policy. It should seem, too, that the rule of law which in this country entitles the shipowner to recover these charges under an insurance like this against the underwriters is in strict accordance with sound policy. For if the master knows, where the ship has been lost and the cargo may be sent forward to its destined port, that his owner will be indemnified in respect of the cost which he may incur in so forwarding the goods, he will have every inducement to save the property and complete his contract with the owner of the cargo; whereas, if the cost of the conveyance of the goods for the rest of the voyage is to fall upon his owner without recourse to the under-

writers, he will be exposed to the temptation of evading the performance of what may at least be termed a moral duty, and may leave the cargo to its fate in the foreign port in which it may have been unshipped.

"We are of opinion, therefore, that whether it be the duty or not of the master, under circumstances like these, to forward the cargo in another ship to its destined port, that upon the facts of this case there was a total loss of the freight when the ship had become a wreck, and the goods had been landed at Rio; and that the cost incurred by the master in shipping the goods by the CAPRICE, and causing them to be conveyed to this country, is a charge within the express terms of the suing and labouring clause, and that the amount, or the due proportion of it, is recoverable under that clause against the underwriters.

"The cases of Great Indian Peninsular Railway Company v. Saunders, and of Booth v. Gair have been pressed upon the attention of the Court, as showing that a loss of this nature is a partial loss only, and cannot be recovered against the underwriters by reason of the warranty against particular average. But these were cases of insurance upon goods, to which the *pro rata* doctrine has no application, and where, the whole or a great portion of the goods still existing in specie, it was impossible to hold that a total loss had arisen. And Mr. Justice Blackburn appears to have marked the distinction between the case of goods and that of freight, and forborne to intimate any opinion upon the point

which we have now to determine.

"But another case from the United States has been cited under the high authority of Storey, and where it is supposed to have been held that, under circumstances like these, there was a partial and not a total loss of freight, and that the underwriters were not liable upon the policy; but this case of Jordan v. Warren Insurance Company has really no application to the case before us. There the insurance was on freight from New Orleans to Havre; [103] the ship was run aground and injured before it left the Mississippi, but returned to New Orleans, and after unshipping the cargo, was completely repaired and reinstated, and might have taken the cargo on board again and completed the voyage to Havre; but the cargo, having been much damaged, was sold at New Orleans, under an arrangement between the parties, and the ship proceeded on another voyage, not to Havre, but to England. Under these circumstances the shipowner, who claimed as upon a total loss of freight, was held entitled to recover only upon a partial loss, that is to say, for the loss of freight upon some part of the cargo which had been destroyed before it was re-landed at New Orleans, and which therefore could never have earned freight at all by the completion of the voyage. No question was raised there concerning particular average, or the suing and labouring clause in a policy. The case, therefore, has no bearing upon the present; but it may be remarked that, where any claim to freight at all was treated as recoverable, it seemed to be upon the footing of a total loss reduced to a smaller

amount by expenses incurred for the benefit of the underwriters, and spoken of as salvage.

"It remains only to observe upon the evidence given in this case that expenses incurred in preserving the subject matter of insurance were designated as particular charges, and not as particular average. We think that this evidence in no wise controls or varies the language of the policy, and that it is admissible to show the mode in which expenses of this nature are treated by mercantile men. But this evidence, or the usage which it proves, is in affirmance of the common law of England, which of itself defines the nature and character of these charges, and if rejected and struck out of the case would leave the question in the cause as it was before.

"We think, therefore, on the whole, and upon the true construction of the policy, that on the destruction of the ship and the landing of the cargo at Rio there was a total loss of the freight, unless it could be averted by the forwarding of the cargo by another ship to Great Britain; that the forwarding the cargo by the CAPRICE was a particular charge within the true meaning of the suing and labouring clause, and not the conversion of total loss into a partial loss, which brought the case within the warranty against particular average; and that the due proportion of that particular charge, that charge being thus within the suing and labouring clause, and incurred for the benefit of the underwriters to preserve the subject of the insurance, and to prevent a total loss, is recoverable under the policy in this action.

"The judgment of the Common Pleas must therefor be affirmed." [104]

Mr. Campbell then offered and read in evidence the case of

Meyer and Others v. Ralli and Others, III Aspinall's Maritime Cases, 324,

as follows:

"ARCHIBALD, J. This is a special case, with power to draw inferences of fact. The action is on a valued policy of insurance on 18,750 kilogrammes of rye, valued at 2731£, including 150£ advance, on a voyage from Enos to Schiedam, in the Austrian ship UNICO, warranted free of particular average unless the ship be stranded, sunk, or burnt, which was underwritten by the defendant in the sum of 2731£. The policy also contains the usual clause, that in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel, for, in, and about the defense and safeguard and recovery of the said goods, merchandise, ship, etc., or any part thereof, without prejudice to the insurance, to the charges whereof the assurers will contribute.

"On the 21st July, 1865, the defendants had entered into a charter-party with one Faltata, of Venice, for the charter of the UNICO, then lying at Smyrna, to proceed to Enos, a Turkish port, and there load a cargo of grain or corn and carry it to Amsterdam or Schiedam direct, and had on the 2nd Nov. 1865, shipped at Enos on board the vessel, of which Antonio Lucovich was the master, a cargo equal to 2,343 English quarters, or 6,800 hectolitres

of rye, sound and in good order and well conditioned. The captain received at Enos 150£, pursuant to the terms of the charter-party. He also signed a bill of lading.

"On the 8th Nov. the UNICO, then laden with the said cargo in bulk, left Enos, on the voyage. On the 14th Nov. the plaintiffs, through their agents, Messrs. Schroder and Bonniger in London, purchased from the defendants for 2,735£ 8s. 6d., the cargo in question, including freight and insurance to Schiedam, as per charter-party; and on the 21st Nov. the defendants handed to them the policy in question.

"During the months of November and December, 1865, the UNICO on her voyage met with very tempestuous weather, in consequence of which she was obliged to jettison a portion equal to 300 hectolitres of the insured cargo; and on the 14th Jan., after hoisting signals of distress, she was taken by a French fishing smack into the port of La Rochelle, in France. On her arrival there, the captain placed [105] himself in the hands of Messrs. Admyrault and Seignette. Mons. Admyrault was the Austrian Consul, and his firm made all necessary advance of cash to the captain.

"Certain proceedings were, as stated in the special case, taken at the instance of the captain in the Tribunal of Commerce at La Rochelle, in consequence of which, first a portion, and eventually the whole of the cargo was landed and warehoused by order of the Court. On the 10th Feb., 1866, a portion of the cargo, amounting to 5,552 kilogrammes, was, by order of the Tribunal of Commerce, sold, and real-

ized 8,537 fr. 65 c. On the 21st Feb., 1866, on the petition of the captain, the Court ordered the sale of the residue of the cargo by public auction.

"Immediately on receiving information of this order, on the 21st and 22nd Feb., 1866, Messrs. Schroder and Bonniger, on behalf of the plaintiffs, gave notice of abandonment to the defendants, on the ground that in the opinion of experts or surveyors, the rye could not be forwarded to its destination. This notice the defendants declined to accept.

"On the 5th March, 1866, the defendants in their capacity of shippers, vendors, and insurers of the cargo, summoned Captain Lucovich before the Tribunal of Commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye, and for a new survey to be ordered. The Tribunal of Commerce thereupon ordered that the sale of the rye should be provisionally suspended, and that a new inspection should be proceeded with by three surveyors, whose instructions were to say if it were possible by continuing the expedients of manipulation and ventilation to preserve it in its good condition, so as to enable it to be re-shipped without risk, and to be conveyed to Schiedam, its destination.

"On the 14th March, the surveyors having examined the rye, then in certain warehouses, were unanimously of opinion that the grain might be perfectly well reshipped and conveyed without any danger to Schiedam, recommending that, if not reshipped very speedily, it should be subject to ventilation once a month until the moment of its being put

on board for conveyance to its destination. This report was confirmed, and ordered to be executed by the said Court, and notice of it was given to the plaintiffs on the 17th March, 1866, together with notice that any course pursued with the cargo or any portion of it was for their account, and on their responsibility.

"On the 11th May, 1866, the Captain of the UNICO applied to the Tribunal of Commerce for and obtained authority to raise a loan on the bottomry of the ship, freight and cargo. On the 6th June the Captain filed a petition in the Tribunal of Commerce, stating that he had been unable to effect a loan on bottomry, and asking the Tribunal to declare the ship unnavigable under Articles 369 and 389 of the French Code de Commerce, and a decree was made in conformity with the petition. [106]

"On the 21st June, 1866, Messrs. Admyrault and Seignette, who had made considerable advances to meet the several expenses caused directly and indirectly by the forced interruption of the voyage summoned the captain before the Tribunal of Commerce, to show cause why in default of payment to them of 20,000 francs within a fortnight from that date, they should not be authorized to sell for account of whom it might concern the said ship and the remainder of the cargo, the price to be paid over to them and used for the purpose of covering the advances made or to be made, and the surplus paid over to whom it might by justice be commanded; and upon the 11th July, 1866, after service of the last-mentioned sumomsn, Captain Lucovich issued a summons to the under-

writers, and the then unknown holder of the bill of lading of the cargo, in order to their becoming parties to the suit commenced by the summons of the 21st of June, and submitting such conclusions and arguments as they might think proper, and to hear it declared that the judgment to be pronounced was to be common to and binding upon all the parties.

"The summons of the 21st of June came on for hearing on the 14th of Sept., 1866, in the absence of the defendants or any person appearing on their behalf, when the Tribunal ordered the sale of the ship UNICO, and a statement of general and particular average of the ship and her cargo to be drawn up, which was accordingly done.

"On the 22nd Oct., Messrs. Michel et fils, having on behalf of the plaintiffs, made a claim for payment of 3.780 francs for the advance freight paid to Captain Lucovich, and the captain inferring from this that the plaintiffs were the holders of the bill of lading for the cargo, then served upon them a notice of the judgment of the 14th Sept. 1866, and a summons to attend on all subsequent proceedings.

"The plaintiffs had not, prior to the 23d Oct., informed the master of the UNICO that they were the holders of the bill of lading, and had not been summoned to attend any of the proceedings before the Tribunal of Commerce, and had not made themselves parties to any of the proceedings.

"On the 21st Dec. 1866, the Tribunal of Commerce remanded to the 25th Jan., then next the decreeing respecting the statement of average; but nevertheless, on several grounds, among others that the state

of the weather was unfavorable to its preservation, ordered the sale of the remainder of the cargo of the UNICO, and the purchase-money was ordered to be paid over to Messrs. Admyrault and Seignette, to cover the advances made by them which included expenses incurred in and about the unsold portion of the rye down to the date of the decree, together with the charges required [107] by the law—the costs to be costs of average. This last mentioned judgment was given in the absence of any person representing the defendants. On the 10th Jan., under the said order, the remainder of the cargo was sold by public sale at La Rochelle, and realized a net sum of 27,830 fr. 30 c.

"The total agreed freight of the cargo from Enos to Schiedam was 16,695 fr. 95 c. Of this 3780 fr. (150 £ sterling) was, as already stated, advanced at Enos, leaving 12,915 fr. 95 c. unpaid.

"On the 25th Jan. the Tribunal of Commerce, by its judgment, declared that the freight for conveyance of the cargo from Enos to Schiedam was due in its entirety (including freight on the 300 hectolitres jettisoned), and that the advance to the captain on account of freight at Enos must contribute to general average, and referred back the statement to the average stated for the purpose of modifying the calculations therein; keeping in view, first the said judgment, secondly the sum realized by the sale of the rye, thirdly the various costs in the suit. The Tribunal also said that the average staters were at the same time to establish the net amount of the freight to be received by the captain out of the sum

realized by the sale of the cargo.

"The plaintiffs in this action were summoned through their agents, Messrs. P. Michel et fils, to appear in these proceedings, but they made default, and the judgment of the 25th Jan., was rendered without any opposition. The defendants in this action were not summoned to appear or defend the proceedings of the Tribunal of Commerce otherwise than by a summons left at the bar of the Procureur Imperial, according to French procedure, but not received by the defendants.

"On the 24th May, 1867, the Tribunal of Commerce confirmed an amended statement of general and particular average which had meanwhile been made, and condemned the plaintiffs to pay the sum of 12,915 fr. 95 c. remaining due on account of freight, with interest from the 11th July, 1866, to the time of payment, and ordered that sum, being, as stated in the judgment, secured on the cargo, should be paid to Captain Lucovich by Messrs. Admyrault and Seignette as consignees. The said sum, together with 1,000 francs damages and interest thereon from the 28th June, 1867, together with an additional sum for costs subsequent to that date, was paid ultimately at La Rochelle to Captain Lucovich, after divers proceedings taken by him against the plaintiffs, out of the proceeds of the cargo. Such payment was made under and in pursuance of a judgment of the Civil Tribunal of La Rochelle of the first instance, dated the 7th Aug. 1867. [108]

"It is stated in paragraph 52 of the special case that, by the Law of France, the Tribunal of Com-

merce had jurisdiction to order the said various surveys of the ship and cargo and statements of average, and to make the said various orders, judgments, and decrees, but that it is a court of first instance of inferior jurisdiction, and its judgments, orders, and decrees are subject to appeal to the Imperial Court at Poitiers, which, if made, is usually decided in four or five weeks, and that no appeal was taken on the part of the plaintiffs.

"It was admitted also in the case that the damages referred to in paragraphs 8, 11, and 13 were caused by the perils insured against. It is also found that the rye which was sold on the 10th Jan., 1867, was in March 1866 and in Jan., 1867, merchantable rye, and such as, if it had been carried on to Schiedam at any time between the time of its landing at La Rochelle and the time of its sale, would have fetched at Schiedam, a price considerably more than the total of all the extra expenses properly incurred in respect of it, and consequent upon the interruption of the voyage under the circumstances, including the extra freight of forwarding it to its destination. It is also admitted by the defendants that, if the proportion of freight payable upon the rye sold on the 10th Jan., under the said average statement is to be taken into account, and added to the extra expenses aforesaid, the amount would be more than the rye would have fetched at Schiedam, if forwarded to its destination either in March, 1866, or Jan., 1867.

"The questions which arise in the case are: First, whether there was a constructive total loss of the cargo; Secondly, if not, whether the plaintiff is en-

titled to recover any and what portion of the expenses under the sue and labour clause.

"For the purpose of deciding these questions, it is necessary to consider the effect of the proceedings and orders of the Tribunal of Commerce of La Rochelle. But, before doing so, it may be worth while to inquire what, under the circumstances, was the duty of the captain. It is found in the case (paragraph 51) that, by the law of France, the master under the circumstances, was not entitled to full freight upon the cargo landed there; but that by Article 296 of the Code de Commerce, he was bound to hire another vessel to carry on the cargo to its destination, and if unable to hire a vessel, was entitled to *pro rata* freight only; and that the law of Austria on this subject is the same as that of France. It is further found that it would have been practicable to hire another vessel to carry on the cargo to its destination. The case also states that the portion of the cargo that was sold by order of the Tribunal of Commerce on the 10th Jan., was [109] merchantable, and would have fetched at Schiedam a price considerably more than the total of all the extra expenses properly incurred and consequent upon the interruption of the voyage, including the extra freight of forwarding to its destination.

"It is quite clear, therefore, that if the captain had done his duty, the portion of the cargo sold on the 10th Jan., 1867, would have been forwarded to Schiedam, and that there would in the event have only been a partial loss, the portion of the cargo forwarded being only liable to pay so much of the

freight of forwarding from La Rochelle (Rosseto v. Gurney, 11 C. B. 176; 20 L. J. 257, C. P.), as exceeded the original rate of freight. The question is, what is the effect of the proceedings in the French courts on this simple state of the case?

"In the view which we take, we do not consider it material, for the purpose of dealing with the question, whether or not there was a constructive total loss, to discuss the effect of the various surveys and orders of the Tribunal of Commerce of La Rochelle, prior to the order of the 21st Dec., 1866, by which the residue of the cargo was ordered to be sold, except in so far as the great lapse of time without any effort on the part of the captain to perform his duty bears on the case. There are portions of those orders and judgments, no doubt, which are properly judgments *in rem,* or in the nature of judgments *in rem,* and binding as against all the world, and, amongst others, as against both the plaintiffs and defendants. But, when we come to the order of the 25th Jan., 1867, whereby it was declared that the freight for conveyance of the cargo to Schiedam was due from the plaintiffs to the shipowner (or the captain as his agent) in its entirety, it cannot be regarded as in the nature of a judgment *in rem,* and apart from the fact that the defendants were no parties to that judgment, though we draw the inference of fact that the plaintiffs had such notice of it (Reynolds v. Fenton, 3 C. B. 187), that they might have appeared and defended, there is this peculiarity in the case, which does not, so far as we are aware, seem

to have occurred before, that upon the express findings in the special case, by which both parties are bound, this part of the judgment seems to be manifestly erroneous in regard to the law of France, on which it professes to proceed.

"The remark that the the defendants were no parties to the judgment equally applies to the judgment of the 7th Aug., 1867, of the Civil Tribunal of La Rochelle, by which the proceeds of the residue of the cargo attached in the hands of Messrs. Admyrault and Seignette was confirmed, and the entire amount of freight ordered to be paid out of it. The defendants, therefore, can hardly be bound by the [110] declaration that the residue of the cargo which was sold on the 10th Jan., 1867, should bear its entire proportion to La Rochelle, in addition to the extra freight of conveying it to Schiedam, or by the order to pay it out of the proceeds of the goods. Moreover, even if the defendants could be considered as at all indirectly affected by such a judgment as binding the plaintiffs, the question is how far, considering the findings in the case, we should be bound to give effect to it as against the plaintiffs.

"It is a matter of nicety how far a judgment of a competent foreign court *in rem,* or between the same parties, is examinable here. The authorities on the subjects are all collected in Story's Conflict of Laws, secs. 547 et seq., and in the notes to Doe v. Oliver (Sm. L. C. 751, 7th edit.), and need not be referred to in detail.

"In the late case of Schibsby v. Westenholz (L. Rep. 6 Q. B. 155; 24 L. T. Rep. 93), the principle on

which effect is given to the judgments of foreign tribunals is stated to be, not on the ground merely of international comity, but on the ground that the judgment of a 'court of competent jurisdiction over the defendant imposes a duty or obligation to pay the sum for which judgment is given, which the courts of this country are bound to enforce; and consequently anything which negatives that duty, or forms a legal excuse for not performing it is a defense to the action': (See Schibsby v. Westenholz.) This principle is also assumed and acted on in Goddard v. Gray (24 L. T. Rep. N. S. 89; L. Rep. 6 Q. B. 139), where the majority of the court held that the judgment was binding, notwithstanding that it proceeded on a mistake as to English law, which did not appear to have been knowingly or perversely acted on.

"In Story's Conflict of Laws, the extent to which and the grounds on which a foreign judgment is said to be examinable or open to be impeached are thus summed up (Article 607): 'It is easy to understand that the defendant may be able to impeach the original justice of the judgment by showing that the court had no jurisdiction, or that he never had any notice of the suit, or that it was procured by fraud, or that it is irregular and bad by the law *fori rei judicatae.* To such an extent the doctrine is intelligible and practicable.' In Castrique v. Imrie (23 L. T. Rep. 348; L. Rep. 4 H. of L. 414), the House of Lords upheld a decree *in rem* of the Tribunal of Commerce of Havre, in which a decree was made in clear violation of English law, on the ground that the foreign law being ascertained as a matter of fact in the case, the

French court, with every honest endeavour to be right, was liable without any fault to go wrong either from imperfect evidence produced before it, or misapprehension of its effect. But in that case in delivering the [111] opinion of the majority of the judges, Blackburn, J., speaking of the judgment on matters of French law, says (23 L. T. Rep. N. S. 348; L. Rep. 4 H. of L. 414), 'we must (at least till the contrary is clearly proved) give credit to a foreign tribunal for knowing its own law and acting within the jurisdiction conferred on it by that law.' And in the case Becquet v. M'Carthy (2 B. & Ad., at p. 957), Lord Tenterden had said before, 'we ought to see very plainly that the court has decided against the French law, before we say that their judgment is erroneous on that ground,' implying that if it clearly appeared to be wrong the court would not give effect to the judgment. Here the court expressly professes to proceed on the ground of French law; and, although the presumption would be that the court in delivering judgment would be taken to know its own law, still it clearly appears that that law was not followed, and we are precluded by the findings in the case from holding that the court has rightly declared it. The contrary—to use the words of Blackburn, J.—clearly appears, and, either from inadvertence or some other reason, the foreign tribunal has gone manifestly wrong. It does not profess to declare what is the law of Austria. If it had, though equally wrong, we might have been bound by Castrique v. Imrie (sup.) to have given effect to it;

but it is a declaration of French law which is wrong.

"Under these circumstances we are of opinion that there is no rule of comity, and no principle on which we are called upon to give effect to such a judgment, and that *pro rata* freight only was payable on the cargo at La Rochelle. If then freed from the burden of the entire freight at La Rochelle, the case finds that the portion of the rye sold on the 10th Jan., 1867, would have realized at Schiedam more than enough to have covered the extra freight from La Rochelle, and in that event, had it been forwarded, there would only have been a partial and no constructive total loss; (see Rosetto v. Gurney, 11 C. B. 176.)

"We must, however, consider the effect of the order of the 21st Dec., 1866, for the sale of the residue of the goods, and whether it could under the circumstances appearing in the case, constitute a total loss.

"Now, although the sale may have been valid and binding, and the plaintiff may thereby have been deprived of the goods: (see Cammell v. Sewell, 2 L. T. Rep. N. S. 799; 3 H. & N. 617; 5 H. & N. 728), still, upon the facts as found, it was a sale of a portion of goods which it was the duty of the captain to have transhipped and forwarded, for which a ship might have been hired at La Rochelle, and which if forwarded at any time [112] between the time of its landing at La Rochelle, and the time of its sale some twelve months after would have realized at Schiedam considerably more than the total of all the extra expenses properly incurred in respect of it and, consequent on the interruption of the voyage.

Under these circumstances, it is impossible not to see that, although the ship and cargo were originally brought within the jurisdiction of the Tribunal of Commerce of La Rochelle by perils of the seas, the sale of this portion of the cargo was not really due to any of the perils insured against, which had long ceased to operate in regard to this portion of the goods, but was in fact made for the purpose of paying advances incurred through the captain's breach of duty. But it was strenuously argued on behalf of the plaintiffs, that the first order for sale of the entire cargo conferred on them the right to give notice of abandonment, and that nothing that occurred afterwards had varied the right. We think, however, that the proceedings in the case with respect to the last portion of the rye sold (the insurance being free of average), when taken together with the opinion we have expressed against the obligation to pay the entire freight at La Rochelle, are clearly in contradiction of that supposed right; and it becomes, therefore, unnecessary to consider a further contention of the plaintiffs, viz., that though acceptance of the notice has been declined, still the conduct of the underwriter in intervening in the Tribunal of Commerce was evidence of such acceptance, and irrevocable.

"Being then of opinion that there was no constructive total loss within the meaning of the policy, it remains to consider the next question—whether the plaintiffs are entitled to recover anything, and how much, under the sue and labour clause?

"It was argued on behalf of the defendants, that at the time the rye was unshipped it was in no danger of total loss, and that it was unshipped solely for the purposes and benefit of the plaintiffs. But it is only necessary to look at the reports which are referred to in the special case, and which are to be taken as correctly setting forth the state of the cargo at the time, to see that it was in a state of heat and partial fermenation from sea water, which if it had been allowed to go on would (and we feel constrained to draw this inference) in all probability have resulted in such damage as to be an actual total loss. It was necessary, then, for the preservation of some substantial part of the cargo, and in order to avert a total loss, to remove or unship the whole cargo.

"It cannot be contended, since the case of Kidson v. Empire Marine Assurance Company (L. Rep. 1 C. P. 535; 2 Mar. Law. Cas. O. S. 400, 468), that the warranty 'free from particular average' excludes [113] the operation of the suing and labouring clause; and that case is also an authority that the occasion upon which the expenses in this case were incurred, was such as to be within it. As to the cases of Great Indian Peninsular Company v. Saunders (1 B. & S. 41; 2 B. & S. 266; 6 L. T. Rep. 297; 31 L. J. 206, Q. B.), and Booth v. Gair (9 L. T. Rep. 386; 33 L. J. 99; 15 C. B. N. S., 291), cited to us by the defendants, we need only refer to the way in which they are distinguished by Willes, J., in his learned judgment in Kidson v. Empire Marine Assurance Company (sup.).

"A more difficult question is as to the amount of the expenses recoverable under this head. This depends, in our opinion, upon the amount of expenses necessary to avert a total loss, for which alone the defendants were liable. That is a matter which, we think, must be reasonably treated, and not judged too strictly. The unshipping of the whole cargo was necessary, in order to its preservation, and to the separation of the sound part from that which was irreparably damaged. But, once conveyed to the warehouse where the separation might take place, any subsequent care bestowed on that which could not be benefited by it sufficiently to enable it to be forwarded to its destination would have been of no use whatever to the residue, and would not in any way have contributed to its preservation. We are of opinion, therefore that the plaintiffs will only be entitled to recover under this head the expenses of unshipping the whole and conveying it to a warehouse where the separation took place, and of the separation, and the expense of conditioning that portion of it which was sold on the 10th Jan., 1867.

"As the case does not afford us the means of stating the amount of the expenses thus incurred, we think it must be referred back to the arbitrator to ascertain the amount, applying the principle we have laid down, and that for the sum so found by the arbitrator the plaintiffs are entitled to our judgment."

Mr. Campbell then offered and read in evidence

"Section 1096 of Arnould on Marine Insurance (8th ed.), as follows:

"But even though the intelligence may have been

true, and the state of things at the time the notice was given such as to justify its being given (i. e., though the loss may have continued constructively total at the time the assured gave notice of abandonment), yet the doctrine has been clearly established in the English law that the right of the assured, after having given such notice, to recover as for a total loss, depends entirely on the state of things [114] as it exists at the time of action brought. If before the commencement of the action the thing insured be restored, under such circumstances and in such a state that the assured may, if he pleases, take possession of it, and may reasonably be expected so to do, this defeats his right to recover as for a total loss. Lord Tenterden thus states the law as understood in this country: 'The abandonment is to be viewed with regard to the ultimate state of facts as appearing before the action brought, according to the opinion of the Court in Bainbridge v. Neilson. Doubts were expressed as to the propriety of that decision by very high authority (Lord Eldon) in Smith v. Robertson; but, notwithstanding those doubts, the rule as laid down in Bainbridge v. Neilson was adopted in the two subsequent cases of Patterson v. Ritchie, and Brotherston v. Barbar. We consider the point to have been well settled, and the rule established by these authorities.' ''

Whereupon, the defendant rested.

Mr. Frank then offered and read in evidence Section 901 of Arnould on Marine Insurance (8th ed.), as follows:

"It will be noticed that the arrangement of all articles of commerce into the three classes contained in the memorandum is a very rough one, and is simply made by forming two classes out of a dozen enumerated articles and throwing all else in the residuum. This arrangement has in recent years been very much developed, with the result that the common memorandum has in practice been very largely superseded by the insertion of special terms adapted to the particular articles at risk. It is probable that, although the memorandum was itself originally introduced in order to restrict the liability of underwriters for particular average claims, its modern development has been just as much due to the acuteness of the merchant displayed in his search for the exact form of insurance which, as regards each particular subject of commerce, will afford adequate protection for real perils without throwing upon him the burden of paying for such as are not likely to arise. For example, some cargoes are [115] not much liable to partial losses; the probability is that if they arrive at all they will arrive undamaged. The real danger in such a case is that of total loss. The merchant recognizing this fact insures at a cheaper rate with a warranty against particular average. With regard to the warranty against particular average, sec. 76 of the Marine Insurance Act contains the following provisions:—

"Sub-sec. 1. Where the subject matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrificed, unless

the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

"Sub-sec. 2. Where the subject matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.

"In an English policy this warranty now takes the following, or some similar form, evolved after many years of bargaining between underwriter and merchant:—

" 'Warranted free from particular average, unless the vessel or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance.

" 'Underwriters, notwithstanding this warranty, to pay for any damage or loss caused by collision with any other ship or craft, and any special charges for warehouse rent, reshipping, or forwarding, for which they would otherwise be liable. Also to pay the insured value of any package or packages which may be totally lost in transhipment.

" 'Grounding in the Suez Canal not to be deemed a strand, but underwriters to pay any damage or loss which may be proved to have directly resulted therefrom.'

"And apart from settled clauses, many of the large London merchants have special arrangement with

their underwriters, providing for the exact risks insured against, which vary according to the nature of each article of commerce."

Mr. Frank then offered and read in evidence the case of Ionides v. Univ. Marine Ins. Co., 32 Law. Jour. Com. Pleas, 170; 14 Eng. Ruling Cas. 271, as follows: **[116]**

"The declaration in this case was upon a policy of insurance made by the defendants in respect of the sum of £3000 upon 6,500 bags of coffee, valued at £25,000, warranted free from particular average, unless the ship should be stranded, sunk or burnt; general average payable as per foreign statement; warranted also free from capture, seizure, and detention, and all the consequences thereof, or of any attempt thereat, and free from all consequences of hostilities, riots or commotions, by the ship or vessel called the LINWOOD, lost or not lost, at and from Rio de Janeiro to New Orleans and/or New York, calling at Balize for orders, including the risk of craft. The policy also contained a covenant that the said insurance should commence upon the goods and merchandise on board the said ship from the loading of the said goods or merchandise on board the said ship or vessel, at as above, and until the said goods or merchandise should be discharged or safely landed; and that it should be lawful for the said ship or vessel to proceed and sail to, and touch and stay at, any ports or places whatsoever in the course of her said voyage for all necessary purposes without prejudice to the said insurance. And touching the

adventures and peril which the defendants were made liable to by the said insurance they were declared to be of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrest, restraints and detainments of all kings, princes, and people, of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the aforesaid subject matter of the said insurance or any part thereof. The declaration then averred, that the coffee was placed on board the said ship, and that, while it was so on board, the ship was stranded, and afterwards, and during the continuance of the said risk, the said goods were by divers of the perils insured against, and not by any of the excepted perils, totally lost.

"The defendants pleaded to this count that the goods were not lost by any of the said perils insured against by the said policy; and that the goods were lost by certain of the perils from which the same were by the policy warranted free.

"The action was tried before Erle, Ch. J., at the sittings in London after Hilary term, when it appeared that 6,500 bags of coffee were shipped on board the LINWOOD, at Rio, on the 24th of May, 1861. On the 26th of May she sailed from Rio, and on the 1st of June arrived at Balize, at the mouth of the Mississippi. On the 3d she left Balize for New York, and proceeded on her voyage until the

night of the 17th, when the captain, thinking he had already passed Cape Hatteras, changed his course from N. E. to N. and he continued this course until about half-past eleven, when she went on shore. [117] It was found that she had taken the ground about ten miles to the southwest of the point where the light used to be on Cape Hatteras.

"At the time the ship left Rio, and for some time previously, there had been a conflict between the Northern and Southern States of the United States of America. The former were generally distinguished by the name of Federals and the latter by that of Confederates. By foreign nations generally, and between themselves to a considerable extent, the two parties to the conflict were respectively treated as independent belligerent states, to which the ordinary law of nations as regards belligerents was applicable.

"Up to the 15th of April preceding this disaster, there had always been a light on Cape Hatteras, but on that day it was extinguished by order of the State authorities of the State of North Carolina, which had joined the Confederates. The object of so doing was to hinder the Federal navigation. The fact both of the existence of the war and of the extinction of the light was unknown to the master of the LINWOOD until the day after the disaster. His vessel was the property of Federal owners, and the cargo that of a British merchant.

"On the morning of the 18th of July, two officers of a militia regiment of North Carolina, who were

then in charge of that part of the coast, came on board the LINWOOD; but, after remaining only a short time, returned on shore taking the master with them, and in the course of the same day both he and the crew were made prisoners, and not allowed again to go on board the vessel. No portion of the cargo was removed, or could be removed on that day, on account of the rough state of the weather. On the following day 120 bags of coffee were safely landed from the ship by certain persons called wreckers, but who were, in fact, salvors, and who acted under the orders of an officer holding a commission for that purpose under the Federal government.

"A thousand bags more could have been saved but for the interference of the soldiers of the above-mentioned militia regiment, who prevented it. The ship broke up on the 20th, and all the coffee but the 120 bags which had been brought on shore was totally lost.

"The above facts were admitted at the trial, when a verdict was entered for the plaintiff for the amount claimed, leave being reserved to the defendants to move to enter a nonsuit, or to reduce the damages, on the ground that the loss was occasioned by the excepted perils, or at least that a partial loss was by such perils turned into a total loss. The Court to have power to draw such inferences as a jury might draw from the above facts. * * * [118]

"ERLE, Ch. J.—In this case I am very much obliged to the learned counsel who are concerned on both sides for their very able argument, the result of

which is, in my opinion, that we ought to give our decision in favor of the plaintiff in respect of a partial loss.

"This was an action upon a policy of insurance upon coffee, and the policy contained this clause of exception: 'Warranted free from capture, seizure, detention, and all the consequences thereof, and of any attempt thereat, and free from all the consequences of hostilities, riots and commotion.' It turns out that the insured ship, with a cargo of coffee on board, in proceeding from Balize to New York, had to pass by Cape Hatteras. What the Captain intended was to steer northeast till he had rounded the Cape, and then to steer due north to New York; but he got out of his reckoning, and when he was thirty miles south of the Cape and ten miles westward of it, thought that he had passed it. The consequence was that turning to the north too soon he ran ashore.

"If there were nothing more in the case, it would be a clear loss by perils of the sea; but there is this further fact to be taken into consideration, that at Cape Hatteras there had been maintained, until the secession of North Carolina from the United States, a lighthouse, and when, at the outbreak of the present war in America, North Carolina seceded and sided with the Confederate States, the light at Cape Hatteras was put out for a hostile purpose; the Federal ships being likely to suffer from the want of the light, if they had to pass Cape Hatteras.

"I also take as a fact for the purpose of this judg-

ment that, if there had been a light on Cape Hatteras, the captain could have seen it and could have put his ship about, that the ship would not have been lost in the manner in which it was.

"Now the grand contention upon the first part of the case is, whether the loss of the ship was a loss caused by the consequences of hostilities within the meaning of this policy. I quite agree with the learned counsel who have argued the case on both sides that it is a question of construction; and that the intention of the parties is to be gathered from the words in the instrument with the surrounding circumstances. The words are not so usual as to have been the subject of judicial interpretation before, and it is my duty at the present moment to put that construction upon them which I think the parties to the instrument intended. I quite agree with the learned counsel who, in the course of the argument, have either affirmed or conceded that these words are to be construed in the same way as if the assured had reassured his cargo against those perils which are excepted in the warranty that we now have to construe. So that, if the action had been on that policy [119] of reassurance, and the ship had been lost in the manner I have stated, then it would have been the duty of the Court to say whether the putting out of the light, which was a consequence of hostilities, was so connected with the loss of the ship as to make the insurer liable.

"The words are to be construed with reference to the known principle pervading insurance law, *causa*

proxima non remota spectatur. The relation of causation is a matter that cannot be often distinctly ascertained; but if, in the ordinary course of events, the one antecedent is constantly followed by the other sequence, they may be taken to stand, in common parlance, in the relation of cause and effect.

"Now, in the present case, were the putting out of the light and the loss of the ship so connected together as to stand in that relation in the ordinary course of events? I think they were too distantly connected with each other to stand in that relation.

"I will put an instance of what I consider a consequence within the meaning of this policy. Supposing there was a hostile attempt at the seizure of the ship, and the enemy was to follow the ship, and the ship to escape seizure was to run aground or to run ashore, the loss would be then caused by the attempt at seizure, and it would be within the exception.

"I will suppose again that the enemy gave chase to the ship for the purpose of seizing her, and to avoid being seized she got into a bay where there was neither anchorage nor port, and the wind on shore, and where, if the wind so continued, it was physically certain that she must be lost, I should say that the ship, being driven on shore by the wind, under those circumstances, was lost by the consequences of an attempt at seizure, and that it would be within the exception. The exception has reference to seizure and the consequences thereof or of any attempt at seizure.

"I will suppose a third case, that is, that the wind

did change, and that the ship got out of the bay and proceeded on her voyage, and afterwards in the course of the voyage was overtaken by a storm, which she would have avoided by having arrived at her port if she had not been obliged to deviate and delay by reason of the attempt at seizure. If she foundered in the storm, there would be then a loss which never would have occurred if there had not been the attempt at seizure. But the loss would not be connected with that attempt in that proximate relation which, in the ordinary course of events, is necessary to connect the loss with what is called the cause of the loss. The ship going out of the bay and proceeding on her [120] voyage, it is not a sequence in the ordinary course of events that if a storm should overtake her she should sink in the course of that storm. I suppose, as a fact found in the case, that if she had not been obliged to deviate she would have been safe in port before the storm came on. Then I should say that, although the consequence of the attempt at seizure was the cause without which the loss never would have happened, yet it is not the efficient cause of it, in the language used in some of the cases analogous to this, or the proximate cause of it, in the language of some other cases. The one fact is too remote from the other to call it a loss by the consequence of hostilities, and, therefore, it would be a loss by perils of the sea.

"Take another instance. The warranty extends to loss from all the consequences of hostilities. I will assume that the ship is destined for a port where

there are two channels of entrance. In one of those channels there is a torpedo which has been laid down for hostile purposes; in the other there is none. If the master of the ship coming into the port knows nothing of the torpedo and the ship is sunk and destroyed, there, of course, the consequence of hostilities leads directly to the destruction. The hostilities having induced the occupiers of the port to lay down the torpedo, if the ship struck on it and was destroyed, this is the consequence of hostilities, which are the proximate cause of the loss, and so the loss is within the exception. But suppose the master is aware that the torpedo is there, and for the purpose of avoiding the torpedo he takes the other channel, and from bad navigation the ship runs aground there, and is lost. In my opinion that would be a loss not within the exception, because by good navigation she might have passed through safely. I should say that the ship so lost would be lost by the perils of the sea, within the meaning of the policy.

"Now, let us apply these considerations to the present case. The captain had missed his reckoning, and either not having a sufficient look-out, by which he would have seen the breakers ahead when he was coming towards the shore, or not lying to in the night, when he doubted of his position, he runs on shore. And it is not, in my opinion, the absence of the light which proximately causes the running on shore, within the meaning of marine policies. It would, therefore, follow that the wreck of the ship is not within the exception, but is within the policy; and if

the wreck of the ship brought about the loss of the cargo, the insurer of the cargo is, so far, to be considered liable.

"But then follow the subsequent events. The ship struck on the Tuesday night. On the Wednesday [121] the weather was too rough to save the cargo. On the Thursday the weather was smooth enough, and considerable part might have been served. One hundred and twenty bags were saved, and 1,120 might have been saved, but that the Confederate troops came down and interfered with the officers of the Federal government, who had the duty to save the cargo, and who were salvors in fact, though they are called wreckers.

"No doubt, when the ship was wrecked at first, and there was no appearance of being able to save any of the cargo, there was presumably a total loss of the cargo. But when the course of events showed that the ship had not gone to pieces, and there was a part of the cargo, at least, that could have been saved, then the presumption of a total loss ceased. When a part of the cargo was actually saved, of course that presumption was demonstrated not to apply to that, and I take it to be found as a fact that 1,000 bags more could have been saved, but were prevented from being saved in the manner I have mentioned. Those 1,000 bags, as between the parties to this instrument, must be taken to have been, if I may say so, potentially saved, and they would have been saved, but that saving was prevented by the consequences of hostilities and commotion. That being

so, those 1,000 bags were brought within the exception in this policy, so that, with respect to them, the loss was a loss for which the underwriters are not liable. One hundred and twenty bags were not lost at all; for 1,000 bags the insurers are not liable, although they were lost; but for 5,380 bags the insurers are liable, for to that extent, it appears to me, there was a partial loss within the meaning of this policy.

"It was gravely contended by the learned counsel for the defendants that there was a total loss of the cargo by capture; and if there was a total loss of the cargo by capture, that would be within the warranty of exceptions, and the insurer would not be liable. But it appears to me that none of the authorities apply to the case that is now before the Court. It appears to me that the ship was in a state of wreck; that the cargo was in the nature of wreck; and that the act of the troops, in all they did on the wreck in relation to the cargo, was the act of collecting what they could despoil from the wreck for themselves, and by no means the act of troops taking possession of a ship, or of a cargo, in the capacity of troops making a capture.

"I think, therefore, that the verdict ought to be for the plaintiff for the value of the 5,380 bags, the loss of which, in my opinion, was covered by the policy. [122]

"WILLES, J.—I am of the same opinion upon all the points.

"There are three matters with reference to which

the case may be considered. First, with reference to the effect of there not being the usual light at Cape Hatteras. Secondly, with reference to the wreck and its immediate effects. Lastly, with reference to the hostile seizure by the Confederate troops. Now, so far as the absence of the light is concerned, the question to be considered is, whether the loss of the vessel in consequence of the possibility, or indeed the strong probability (as enforced by Mr. Maclachlan in his able argument) of her escape from shipwreck, if the light had been there, is to be attributed to the consequence of the hostile act of putting out the light. It may have been, in one sense, the cause of the loss; but it was not the proximate cause. It was not the absolute certain cause of the loss. The proximate and absolute certain cause of the loss was the fact of the vessel taking the wrong course, and getting on the rocks at Cape Hatteras. Now, I apprehend that, as soon as that is stated, the only question remaining to be considered is, whether there is to be applied to this case the ordinary rules of the insurance law, namely, that you are not to trouble yourself with distant causes; that you are not to go into metaphysical distinctions between causes efficient and causes material, and causes final, and so on of the rest of them, but you are to look to the proximate and immediately operating cause of the loss, and to that only; that is, whether the ordinary rule of insurance law is applicable to this policy. It has been argued that it is not applicable to this policy, because of the introduction into the exception of the words 'all conse-

quences of hostilities'; assuming, as I also intend to do, that the acts of the persons called Confererates are to be treated as hostilities. But I apprehend that that is quite a fallacious argument on the part of the defendants. I apprehend that, putting a construction on this exception, you are to look only to the proximate consequences of hostilities, notwithstanding the use of the word 'all' in that part of the policy which is for the benefit of the insured. The introduction of the word 'all,' as everybody must be aware, is unnecessary, because no rule of grammar can be more clear, and no rule has been longer adopted in the law, than that words general and words universal are all one. It seems to me that the proper construction to put on the words 'all consequences of hostilities' is the construction which you would put on the words 'consequences of hostilities.' They mean nothing more nor less. They refer to the totality of causes to be considered, not to their sequence, or **[123]** their proximity, or their remoteness.

"I will put this case: I will assume that a vessel upon the same course as this vessel was leaving Rio, and that the captain was acquainted with the fact that the light, on Cape Hatteras had been extinguished by the Confederates, the result of which is, that he keeps further out at sea, and so goes on shore on an island which he would otherwise have avoided, and his vessel is wrecked. To take the consequences one step further, I will suppose that the vessel is wrecked for want of a light there, which has been extinguished by a mariner, who had been himself

shipwrecked by reason of the light having been extinguished by the Confederates at Cape Hatteras, and who, being embittered against all mankind, had proceeded to put out the light on the island where the vessel is wrecked. That is a case in which the vessel is unquestionably wrecked, in some sense, in consequence of the light having been put out on Cape Hatteras; but can any person in his senses, dealing with the law of insurance, which regulates men of business and their affairs, suppose that that consequence is a consequence which is covered by this exception?

"But, if you cannot carry the exception of consequences of hostilities into all consequences, however remote, you are necessarily driven to that with which I started, namely, to say that consequences here must be dealt with according to the ordinary rule as proximate consequences.

"Nor is this a rule which is for the benfit of the assured only. It is also applied for the benefit of the insurer, and it is unnecessary to give any further instance of that than the well-known case of De Vaux v. Salvador (4 A. & E. 420, 5 L. J. (N. S.) K. B. 134, p. 305, *post*) which made it necessary to add another clause to policies. The insurers and the insured are equally bound by the rule, and applying that rule to this case, the wreck of the vessel was as between these parties, and according to the law applicable to the contract which they had entered into, a wreck by the perils of the sea, and not a wreck in consequences of hostilities.

"Now I come to the next portion of the case, I

mean the wreck and its effects. I prefer dealing with that before dealing with the effect of hostilities. The facts have been stated, and it is enough, therefore, in order to introduce my judgment on this point, to say shortly that the vessel was stranded, and was totally lost from the moment she went on the rocks, without hope of recovery. With respect to the cargo that was on board of her, the general law, I apprehend, is simple. The vessel having been shipwrecked, and having taken water by **[124]** the shipwreck, those facts of themselves would have been sufficient to give rise to a right to abandon, not only as regards the vessel, but a right as regards the cargo. And this is not a rule peculiar to our own, but is common to most systems of law. In illustration of this, I need only refer to the Treatise of Emerigon, vol. I, pp. 401, 402, ed. Boulay-Paty, 1827, where he gives an instance in which the vessel went ashore both *naufrage* and *bris;* part of the cargo was saved, damaged, and part of the cargo was saved, not damaged; and there that most learned and experienced of lawyers seems to consider that it was a case of abandonment, notwithstanding the saving of a portion of the goods in an undamaged state; and he does so for the reason which has been stated by Mr. Maclachlan, in his argument, that the law in these cases avoids the raising of questions which it would, in the great majority of cases, deem impracticable to determine, or determine with precision.

"I am quite aware that this has not been adopted to its full extent in our jurisprudence, or in that of America; but it may serve as an introduction, be-

cause it shows that the experience of mankind is in favour of the proposition of which the authorities seem to furnish, namely, that where there is a wreck of a vessel, without any hope of recovering her, the cargo is to be treated as also lost if the circumstances are such that no part of it can be recovered for the use and benefit of the persons insured. Take the case of a vessel wrecked on an uninhabited island, where the removal of the goods from her, the sending out a vessel to do so, and bringing the goods home, would be ruinous, in comparison with the value which the goods would fetch when brought home. Of course you have there a case of absolute total loss immediately. Take, again, the case of a vessel being wrecked where the inhabitants of the island are savage people, who seize a portion of the goods, or, a portion of the goods being saved by the crew, the crew are immediately deprived of them by the savage people of the place. There, again, you have the case of a total loss. That is the case of Bondrett v. Hentigg, Holt's N. P. 149 (17 R. R. 625). There part of the goods was lost, part was got ashore, and the wreck was destroyed and plundered by the inhabitants of the coast, so that no portion came again into the possession of the assured; and Chief Justice GIBBS there deals with the case as one of a total loss; and he gives this reason, that the portion of the goods which were saved from the wreck, and which they got ashore, never came again into the hands of the owner. He treats that as a proximate consequence of the wreck which has taken place under **[125]** those circumstances.

Therefore, it is not necessary that the ship should be in a condition where it is physically impossible to get any of the goods out of her. You must take all the circumstances into account for the purpose of determining whether any of the goods can be saved for the benefit of the owner. Now, you might put as opposed to that the case of a vessel, such as we all have heard of, going down at the entrance of a dock at the port to which she is bound, the insurance still continuing, and the goods unimpaired, and all capable of being restored with very little difficulty. It is very easy to imagine any number of cases between those two, but it would be a waste of time to do so. Those seem to be the two cases at one extreme and at the other of the list which would be necessary for the purpose of illustrating the rule.

"Now, what have we in this case? We have the vessel absolutely wrecked, and the goods in this condition, that it is possible, consistent with the laws of nature, to save 1120 bags of them. It is impossible to save the 5,380. I apprehend the conclusion of good sense and also of law upon that is, that the 5,380 as to which the loss is certain when the ship strikes are as absolutely lost as the ship itself, at the same moment when she struck the rock. With respect to a thousand bags of them, under the ordinary state of things, if there had been no hostilities (still using that word in the sense which I said I could apply to it throughout), they would have been saved to the owner, subject to the salvage that was properly payable. This being the state of things we have

to consider, what was the effect of hostilities as to the 1000 bags? With respect to them, I quite agree with the argument on the part of the defendants that it was a consequence and a proximate immediate consequence of those hostilities that this portion of the cargo was not saved. I had turned over in my mind whether, as only 120 bags were actually brought on shore, and as the 1000 bags remained exposed to the original peril, and were lost by a consequence of it, whether this remark ought not to be confined to the 120 bags; but I do not think that would be dealing substantially with the question. The 1000 bags, I think, it must be taken, were kept from the shore by the operation of hostilities.

"Now comes the question whether the hostilities had any effect on the rest of the cargo? Much reliance was placed on Livie v. Janson, and many observations were made on the case of Hahn v. Corbet. With respect to Hahn v. Corbet, I think the learned counsel for defendants have established a sound distinction between that case and the present, because there the vessel was wreckd in such a position that, but for the subsequent coming of the enemy and taking a portion of the cargo which they removed from the **[126]** vessel, the whole would have been lost. It was a case therefore in which the vessel was wrecked under circumstances in which there was no probability or possibility of the goods being saved, under the circumstances, for the benefit of the owner. There was no *spes recuperandi*,and the goods which were taken by the enemy had been previously placed in a position to be totally

lost to the owners. Then, on the other hand, I do not think the case of Livie v. Janson, which was said to be the same as this, does at all apply, because in Livie v. Janson what had taken place before the capture was a simple deterioration of the vessel. The vessel was simply deteriorated; there was no total loss of any part of the adventure; she was injured but not destroyed as to the whole or part by the perils of the sea; and it was said that her subsequent immediate capture had the effect of entirely putting out of question the previous injury which she had received, because had she been the best vessel that ever sailed the seas, and without any injury whatever, she would have been immediately captured, and entirely lost to the assured, and captured by reason of an excepted peril. That appears to me to be wholly inapplicable to a case where there was a previous absolute loss or total loss, in the sense in which I use the word total, of the subject-matter in respect of which the assured seeks to recover, and that by perils of the sea. I cannot pass over Livie v. Janson without referring to the very able and learned work of Mr. Phillips on Insurance, in the first volume of which, at p. 673, he throws a doubt on Livie v. Janson and refers to cases in the Courts of his own country where the principle of that case has not been applied to an absolute loss of a portion of the thing insured. But without at all saying I go the length which Mr. Phillips goes in that work, to say that Livie v. Janson is not law, I am clear it can apply only to cases such as where a vessel is deteriorated, and not to the case of the subject-matter of

insurance being absolutely lost by the perils of the sea.

"Now, I must come a little closer to this point, that is, to the question whether there was a capture of the 5,380 bags, and for that purpose I will assume that Livie v. Janson applied. It appears to me there was no capture of the 5,380 bags of coffee. Those 5,380 bags of coffee were incapable of being saved; and it seems to me that it would be an abuse of language to say that a man captures a thing which must of necessity be snatched from his grasp the next moment by the waves; a thing of which he can have no enjoyment and no possession. It has been said, *Ipsum compedibus qui vinxerat Enosigoeum.* One may say that poetically, but to say that a man **[127]** captures a cargo which is on the rocks, and which cannot be got on shore, is to say that which is not the fact. The 5,380 bags were lost to the assured, and were lost to all mankind, from the moment that they were on the rocks without any possibility of their being brought on shore. The result is, as it appears to me, that the 5,380 bags of coffee were lost by the perils of the sea; that the 1000 were lost by the consequence of hostilities; and with respect to the former there ought to be judgment for the plaintiff, with respect to the latter for the defendants.

"BYLES, J.—I am of the same opinion. I speak for myself when I say that neither when I had the honour of a seat at the bar, nor since I have been in this place, have I ever been more assisted by the able arguments of counsel than I have been on the

present occasion. I think the result is to make the case perfectly clear. I will assume for the present purpose that the light at Cape Hatteras would have been visible had it been lighted in the usual way, and that the captain would have seen it, and would have recognized it, and that he could and would have turned about his vessel in time to avoid running on shore. Then, is the absence of the light, which was at the most but the absence of an extrinsic saving power, a link in the chain of causes to which the destruction of the ship is to be imputed? I do not propose to discriminate between the various sorts of causes—which is a matter that has been discussed by abler intellects than any that now exist 2,000 years ago; but this is plain and admited on both sides: That in a contract of the nature of a policy of insurance the proximate or immediate cause is the only cause at which the Court can look. I do not enter into the reasons for that; it is established upon authority all over Europe and America, and there is no doubt at all about it; and every judgment of this Court must proceed on the hypothesis that it is established law.

"Then what were the three causes here, which—upon the assumption that the captain would have seen the light had it been there, and have saved his vessel—have caused the loss? First, the original meritorious cause, and in popular language the cause of the loss, was the miscalculation of his position by the captain. He was fifty miles to the westward of his course, and he did not know that. Now comes the absence of the light, which was, as I have said,

but the absence of an extrinsic saving power, and, in that sense, was that the cause of the destruction? As was said in the course of the argument, if a person throws himself into the Serpentine, and the drags are not near, can it be said that the absence of the **[128]** drags was the cause of his drowning? It was but an intervening cause, the absence of a saving power, which had it been exerted would have saved the ship. But still it leaves the proximate or immediate cause of the loss a continuation of the first original meritorious cause, namely, steering the vessel straight on to the rock which caused the loss, and that seems to me to be plainly a loss by perils of the sea. The only time that I ever entertained a doubt about it was when listening to one of the learned counsel for the defendants, Mr. Mellish. He said, suppose there had been a contract between the owner of the lighthouse and the present plaintiff to keep the light burning, and it had been proved that the light was not kept burning in accordance with the contract, and that in consequence the plaintiff in the darkness of the night was thrown on the rocks. Can any one say there would not have been a cause of action? No doubt there would. But then that is necessarily and distinctly a contract against the indirect and remote damage occasioned by the absence of this extrinsic saving power just as much as if it had been expressed in words. For a vessel cannot be lost by the absence of the light, except as an intervening cause of this nature; and in a contract of that kind a loss by subsequent sea-damage would have been included. It seems to me, therefore, that that

hypothesis does not oppose any real difficulty. I must say that from the beginning to the end of the argument the case has presented itself to me on this part of it in the same light.

"When I come to the second question, was the loss a partial loss or a total loss of the cargo, at one time, undoubtedly, I felt some difficulty. There can be no doubt that when the vessel went aground and was totally lost, with respect to the cargo it was not totally lost. The general rule as to the total loss of a cargo is, that a cargo is totally lost when it no longer exists in specie, but has become something else, either by the progress of decomposition or from some other source, when, as has been strongly put in some of the cases, it only exists in the shape of a nuisance. Or it is lost when it is inaccessible and cannot be got at. It makes no difference whether it is on the top of a rock, or at the bottom of the ocean,—in either of those cases there is a total loss of the cargo. That is not so here. The cargo after the vessel was on shore existed in specie. It was accessible, and, as my learned Brothers have observed, the salvors here, who have been called wreckers, and whose name has tended to confuse this case, would have assisted, and would had they been uninterrupted have saved 1,120 bags. My Brother Willes and my Lord also have already pointed out the distinction between this case and Hahn v. Corbet. Since I had the pleasure [129] of hearing Mr. Mellish, I have had an opportunity of looking at that case, and I have looked into it very carefully, and undoubtedly, whatever were the facts of that case,

the Chief Justice puts it distinctly upon the question, When were the goods lost? They were lost when the ship was totally lost; no other ship was near; there was no land near; it was just as if they had been cast on a rock, and they had been completely out of reach. The case, therefore, of Hahn v. Corbet opposes no difficulty. In that case the goods, according to the strictest definition of a total loss, or a partial loss as applicable to goods, had been totally lost. Here there was originally no total loss of the goods, but only a partial loss. Now there was undoubtedly afterwards, except as to 120 bags, a total loss of the goods, but with respect to a portion of the loss it was not by perils of the sea. I will not enlarge upon this point, for I could only repeat what has been said by my learned Brethren. The result seems to me to be clear, that the 1,000 bags were within the exception, and that the rest were lost by the perils of the sea.

"KEATING, J.—I am quite of the same opinion. The principal question, no doubt, as it has been put by the learned counsel for the defendants, is, What is the meaning and construction of the words used in the warranty, 'free from all consequences of hostilities, riots, or commotion'?—and for the reasons that have been given, it seems to me that the intention of the parties was by that exception to warrant the freedom from all consequences of hostilities, riots, or commotion as a cause of the loss which occurred. That being so, it is admitted on all hands that the immediate cause of loss was the perils of the sea. Therefore, if the warranty is to be read in the way that I have stated, there can be no doubt

that, according to the universal construction of instruments of marine insurance, the cause intended must be taken to be the immediate or proximate cause of the loss; that is, the perils of the sea, and not the putting out the light at Cape Hatteras. I also agree with the rest of the Court, that the loss here ultimately is a partial loss. Mr. Mellish well expressed it when he said that as long as the coffee remained, as coffee, under the control of the captain and crew, and was capable of being saved, there could be no total loss. Taking the whole of that together, that seems to be correct; but as bearing on this case the observation arises that as to 5,380 bags, from the moment that the ship struck on the rock the coffee was no longer within the control of the captain and crew, with any capacity to be saved, or capable of being saved,—it was then and there lost presumably quite as much so as it was after it was **[130]** actually lost. As to the 1,000 bags which might have been saved, I have no doubt that their loss was as clearly occasioned by the consequence of hostilities as that the remainder, the 5,380, were lost by the perils of the sea. That being so, I come to the same conclusion that the rest of the Court have arrived at, that the verdict should be for the plaintiff as to the 5,380 bags, and as to the residue for the defendants."

Whereupon, both parties rested.

The cause was thereupon argued by counsel for the respective parties, and thereupon the following proceedings were had:

Mr. CAMPBELL.—I request the Court to find as follows.

That said S. S. "Pleiades" was operated by the California-Atlantic Steamship Company, and, while on said voyage, with said insured cargo on board, on the 16th day of August, 1912, stranded on the coast of Mexico, and was thereafter released, and, with plaintiff's said cargo still on board in an undamaged condition, returned to the port of San Francisco, where said cargo was stored in lighters, and said steamship was repaired, and, on the 27th day of December, 1912, was redelivered to the California-Atlantic Steamship Company; that said California-Atlantic Steamship Company went into bankruptcy about January 1st or 2d, 1913; that said steamship did not complete said voyage.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 7.

Mr. CAMPBELL.—I request the Court to find as follows:

That plaintiff reshipped said cargo in sound condition **[131]** from San Francisco to Balboa on the 15th day of October, 1912, on board the Steamer "Mackinaw," operated by the California-Atlantic Steamship Company; that it was necessary to forward said cargo at that time because, under the contract of sale, if it was not delivered within a certain time plaintiff was subject to a penalty of one-tenth of one per cent. per day, and was liable to have the

shipment refused by the purchaser upon the condition that the contract of sale provided for such delivery within such time.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 8.

Mr. CAMPBELL.—I request the Court to find as follows:

That the reshipment of said cargo from San Francisco to Balboa on board said Steamer "Mackinaw" was voluntary on the part of plaintiff, and was not caused by any perils insured against by said policy, but was made to avoid the penalties of the contract of sale of said cargo.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 9.

Mr. CAMPBELL.—I request the Court to find as follows:

That at the time said cargo was reshipped on board said Steamer "Mackinaw," it was in a sound condition, as when originally shipped on board said Steamship "Pleiades," and was not in danger of loss or damage from any peril insured against [132] by said policy.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said ex-

ception to said ruling as Defendant's Exception No. 10.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was at all times herein mentioned the law and custom of England that underwriters in issuing a policy of insurance on a cargo, of the form issued by defendant to plaintiff, do not contract with reference to the bill of lading on which the cargo is shipped, nor do such bills of lading become a part of the contract of insurance unless incorporated therein; that said bill of lading was not incorporated in said policy of insurance.

The COURT.—The insurance company is presumed to have understood that that would be under some form of affreightment.

Mr. CAMPBELL.—Undoubtedly so. It knew, as every other person knows, that any shipment—that is, it is a physical impossibilty to ship the goods without either an express or written contract of affreightment, or an implied contract of affreightment, under the rules of liabilty of common carriers. It is a different proposition to say that because there is always a contract of affreightment in the case of shipment that we, the Insurance Company, are bound by whatever terms and conditions may be inserted in the bill of lading. For instance, if you should carry the California-Atlantic Steamship Company's bill of lading to its extreme, and I feel confident that Mr. Frank, **[133]** himself, did not believe in it, if he did he would not have brought the suit which he did bring in another court; if the

Steamship "Pleiades" had stranded on the beach outside the Cliff House, here, and had been released from that stranding and had been brought into the port of San Francisco and had been compelled to discharge her cargo for the purpose of a repair that would have only taken two weeks' time, under that bill of lading the California-Atlantic Steamship Company could have put that cargo on board another vessel, either of their own line or of another line, and have carried it forward to Balboa and have charged and collected a second freight for it. I know of no case that says that our policy is to be governed by clauses that may be inserted in a bill of lading,—so many of them that they must be printed in fine print upon the back, in type so fine that you cannot read them without a microscope.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 11.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that an underwriter is not liable, under a policy of marine insurance, for a loss which is not proximately caused by the perils insured against, and, where there is a succession of causes which must have existed in order to produce the loss, the last cause only must be looked to and the others rejected, although the result would not have been produced without them; that in cases of marine in-

surance only the *causa proxima* can be regarded. [134]

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 12.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that an underwriter on a policy of marine insurance on cargo is not liable for losses resulting from delay in the transportation of the insured cargo.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 13.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that the voluntary reshipment of said cargo on said Steamer "Mackinaw" and the payment of said additional freight did not constitute a loss, charge or liability under the policy of insurance covering said cargo.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 14.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that the inability of plaintiff, by reason of the purpose for which said insured cargo was intended and the contract under which it was sold, to detain said insured cargo at [135] the port of San Francisco until the completion of the repairs to said S. S. "Pleiades," and to then forward it in said steamship to destination, did not make the additional freight paid by plaintiff for the reshipment of said cargo to destination by the Steamer "Mackinaw" a loss, charge or liability under the policy of insurance covering the said cargo, as it was not caused by any peril insured against.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 15.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was at all times herein mentioned the law of England that the inability of plaintiff, by reason of the nature of said cargo and the contract under which it was sold, to detain said cargo at the port of San Francisco until the completion of the repairs to said S. S. "Pleiades," and to then forward it to destination, did not make the additional freight paid by plaintiff for the reshipment of said cargo to destination by the Steamer "Mackinaw" a loss, charge or liability under the policy of insurance cov-

ering the said cargo, for it was not due to any peril insured against by said policy, but resulted from the nature of the contract of carriage entered into with the California-Atlantic Steamship Company, charterer of the S. S. "Pleiades," by which said original freight was prepaid, and was to be considered as earned, ship or goods lost or not lost at any stage of the entire transit. [136]

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 16.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that expenses incurred by or on behalf of an assured, under a policy of marine insurance, for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are particular charges, and that particular charges are not included in particular average; that expenses incurred in forwarding to destination goods insured under a policy of marine insurance are not particular average.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 17.

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that particular charges are only recoverable from underwriters on a policy of marine insurance when incurred after the arising of a peril insured against in order to prevent such peril causing a loss for which the underwriters would be liable if it were so caused.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 18. [137]

Mr. CAMPBELL.—I request the Court to find as follows:

That it is and was during all times herein mentioned the law of England that the facts that the nature of said cargo and the contract under which it was sold would render it impossible to detain said cargo at the port of San Francisco during the period required for the completion of the repairs to said S. S. "Pleiades," and then to forward it to destination, constituted facts material to the risk, and the concealment thereof from plaintiff at the time said policy of insurance was issued constituted the concealment of facts material to the risk and voided the policy.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 19.

Mr. CAMPBELL.—I request the Court to find as follows:

That there is no substantial evidence to support a finding against the defendant.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 20.

Mr. CAMPBELL.—I request the Court to find as follows:

That the substantial evidence will not support a judgment in favor of plaintiff.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 21. [138]

Mr. CAMPBELL.—I request the Court to find as follows: That the substantial evidence will not support a judgment in favor of plaintiff.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 22.

Mr. CAMPBELL.—I request the Court to find as follows: That the substantial evidence will not support a finding in favor of plaintiff.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said ex-

ception to said ruling as Defendant's Exception No. 23.

Mr. CAMPBELL.—I request the Court to find as follows: That there is no substantial evidence to support a judgment in favor of the plaintiff.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 24.

Mr. CAMPBELL.—I now move the Court for a judgment for the defendant dismissing the complaint upon the ground that the substantial evidence supports such judgment.

The Court thereupon denied said motion and refused to dismiss the complaint, to which ruling of the Court defendant excepted and now assigns said exception to said ruling as Defendant's Exception No. 25. [139]

The Court thereupon proceeded to make its findings, and, among other things, found as follows, which said finding in the findings of fact of said Court is marked No. 2:

That said steamer "Pleiades" departed on her voyage in said policy mentioned, with said 6,000 cases of high explosives on board thereof, and while on said voyage was, on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss; that the said plaintiff then and there abandoned said cargo to said defendant, which abandonment said defendant then and there refused to ac-

cept; that thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo; that the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters; that the said repairs on said vessel were not completed until December 27, 1912, and said steamer never resumed or otherwise performed said voyage, but said voyage was wholly abandoned by said steamer; that the nature of said goods, and the purpose for which said goods were intended, would have rendered it unreasonable to detain them until the completion of repairs.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 26. [140]

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 3:

That in order to transport the said cargo to its port of destination, the said plaintiff was compelled to, and did, on the 15th day of October, 1912, reship and forward the said cargo on the Steamer "Mackinaw" belonging to the said carrier California-Atlantic-Steamship Company, and transported said cargo therein from the port of San Francisco to the

port of Balboa, for which service the plaintiff was then and there compelled to pay, and did pay, additional freight in the sum of four thousand and fifty (4,050) dollars.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 27.

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 5:

That it is the law of England that if, by reason of damage done to the ship, she cannot be repaired without great loss of time, the master is at liberty to procure another ship to transport the cargo to the port of destination; that there is no absolute obligation on the part of the master towards the owner of the goods to forward them in the original ship. [141]

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 28.

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 6:

That it is the law of England that where freight is

paid in advance, and the contract provides that it is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, such freight is earned by the ship owner when the cargo is received on board, and the right of the ship owner thereto does not depend on the delivery of the cargo at the port of destination.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 29.

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 7:

That it is the law of England, that in case of marine insurance on merchandise, when, in consequence of a peril insured against, an extra freight must be paid by the cargo owner to [142] bring said merchandise to the port of destination, such expense is a loss directly due to such peril insured against, for which the insurer is liable.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 30.

The Court also found, among other things, as fol-

lows, which said finding in the findings of fact of said Court is marked No. 8:

That under the policy and the facts admitted by the pleadings in the case at bar, in connection with the facts herein found by this Court, it is the practice and custom of underwriters in England to pay the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight originally paid, as a loss directly due to such peril.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 31.

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 9: [143]

That under the law of England, it was not the obligation of the carrier in consideration of the original freight, whether prepaid or not, to complete said voyage with said Steamer "Pleiades" upon the completion of the repairs to said steamer, necessitated by such stranding, and to transport the said cargo to its port of destination without requiring the payment of the second freight therefor.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objec-

tion, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 32.

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 10:

That the reshipment and forwarding of said cargo on said Steamer "Mackinaw" to said port of Balboa, and the payment of additional freight, were not voluntary on the part of the said plaintiff and were caused by perils of the sea insured against by said policy, and, under the laws of England, did constitute a loss, charge and liability under the terms and conditions of said policy.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 33. [144]

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 11:

That under the law of England, if by reason of the specific purpose for which said goods were intended, said goods could not be detained at said port of San Francisco until the completion of the repairs of said vessel and thence forwarded in said steamer to the port of destination, and if upon reshipment of said goods to destination an additional freight was paid by plaintiff, such extra freight did constitute a

loss, charge and liability under said policy, and was caused by perils insured against by said policy.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 34.

The Court also found, among other things, as follows, which said finding in the findings of fact of said Court is marked No. 12:

That under the law of England the payment of said extra freight was due to a peril insured against by said policy, and resulted in a loss which said policy did cover.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 35. [145]

The Court also found, among other things, as follows, which said finding in the findings of fact of said court is marked No. 13:

That under the law of England there was no concealment by the plaintiff from the defendant of facts material to the risk, and said policy was not voided.

To the making of the foregoing finding defendant objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled defendant's objection, to which ruling defendant excepted, and now assigns said exception to said ruling as Defendant's Exception No. 36.

In addition to the foregoing findings, the Court also made the following findings, marked 1 and 4, respectively, as follows:

1. That the said cargo was being transported in the said Steamer "Pleiades" under a contract of carriage with the California-Atlantic Steamship Company, wherein and whereby it was provided that freight, whether prepared or to be collected, was to be considered as earned vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the contingencies in said contract of carriage mentioned, said carriers were to have the right to forward said cargo to the port of destination on their own ships, and should receive extra compensation for such service, whether performed by their own vessels or those of strangers; that among the contingencies so provided in said bill of lading were stranding, straining, and any accidents or perils of the sea. That the said plaintiff had prepaid the freight for the carriage of [146] said cargo from the port of San Francisco to the port of Balboa, in the sum of Four Thousand Nine Hundred and Fifty (4,950) Dollars.

4. That the said plaintiff demanded payment of the said insurance company of the said sum so paid by it to forward the said cargo to said port of destination, but said defendant has refused to pay the same, or any part thereof, and no part thereof has been paid.

The Court then made an order, with the consent of plaintiff, that the defendant have twenty (20) days within which to propose its bill of exceptions herein, and that the time for the settlement of said bill of exceptions be carried over to the next term, to wit, the 1915 November term, of said Court. Thereafter, the parties entered into a stipulation extending defendant's time with which to serve its proposed bill of exceptions to and including the 14th day of December, 1915, and the Court made its order extending the said time pursuant to said stipulation.

Thereafter, and from time to time, the Court made its orders, with the consent of plaintiff, extending the time within which defendant might propose its bill of exceptions herein, and that the time for the settlement of said bill of exceptions be carried over from term to term, the last of which orders duly and regularly made, with the consent of plaintiff, carried the time and jurisdiction of said Court for the settlement of said bill of exceptions over to the present term in which it is now settled and allowed. [147]

The foregoing constitute all of the proceedings and all of the testimony offered and received on the trial of said action, and now, within the time required by law and the rules of this Court, said defendant proposes the foregoing as and for its bill of exceptions to the rulings of the Court made during the trial of the above-entitled action and to the decision of said Court, and prays that it may be settled and allowed as correct.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Defendant. [148]

Stipulation as to the Correctness of the Bill of Exceptions.

IT IS HEREBY STIPULATED AND AGREED that the above and foregoing constitutes a true and correct bill of exceptions in the above-entitled action, and that the same contains all of the proceedings had and all of the testimony offered and received on the trial of said action and all of the rulings of the Court made during the trial of said action, and that the same may be settled and allowed as and for the bill of exceptions to such rulings, and to the decisions of the Court herein.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Defendant.
NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Plaintiff.

Order Settling, etc., Bill of Exceptions.

The foregoing bill of exceptions now being presented in due time and found to be correct, I do hereby certify that the said bill is a true bill of exceptions and contains all of the proceedings had and all of the testimony [149] offered and received on the trial of the said action and all of the rulings of the Court made during said trial and all of the exceptions of the respective parties hereto.

WM. C. VAN FLEET,
District Judge. [150]

Plaintiff's Exhibit No. 1—Policy of Insurance, August 7, 1912, on Steamer "Pleiades"

ORIGINAL

CARGO—ENGLISH FORM

FIREMAN'S FUND INSURANCE COMPANY

SAN FRANCISCO, CALIFORNIA

All Policies issued abroad and made payable in the United Kingdom are required by law to have a Government Stamp of one penny per £100 affixed within ten days after date of receipt in the United Kingdom.

No. 307264

£ $35,000

Warranted free of capture, seizure and detention and the consequences thereof or of any attempt therent piracy excepted and also from all consequences of riots, civil commotions, hostilities or warlike operations, whether before or after declaration of war.

It is hereby agreed that the rights of the assured shall not be prejudiced by the insertion in the bill of lading of the London conference rules of affreightment 1893, or of the following clause:

"The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, thieves, arrest, and restraint of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master mariners, or other servants of the shipowners."

Warranted free from average unless general or the ship or craft be stranded, sunk or burnt, each craft or lighter being deemed a separate insurance.

Underwriters notwithstanding this warranty to pay for any damage caused by fire or by collision with any other ship or vessel or with ice or with any substance other than water and any special charges for warehouse rent, reshipping or forwarding for which they would otherwise be liable, also to pay the insured value of any package or packages which may be totally lost in trans-shipment.

Countersigned August 7, 1912. Geo. E. Billings, Marine Agent. By R. C. Ward.

WHEREAS it hath been proposed to the FIREMAN'S FUND INSURANCE COMPANY by Trojan Powder Co.

as well in his or their own name as for and in the name and names of all and every other person or persons, to whom the subject matter of this policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described.

Now this Policy Witnesseth that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of One Hundred & Seventy Five and 00/100ths.....DOLLARS as a premium at and after the rate of ½% per cent for such Insurance the said Company takes upon itself the burthen of such Insurance to the amount of Thirty-Five Thousand and 00/100.....DOLLARS

and promises and agrees with the insured their Executors, Administrators and Assigns in all respects truly to perform and fulfill the Contract contained in this Policy. AND it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from San Francisco Bay to Balboa.

AND it is also agreed and declared that the subject matter of this Policy as between the Assured and the said Company so far as concerns this Policy shall be and is as follows upon $35,000—on 6000 cases High explosives.

laden (under deck) on board the Ship or vessel called the Str. "Pleiades"

General average payable as per Foreign Statement or per York-Antwerp Rules of 1890 if in accordance with the Contract of Affreightment Warranted that should the vessel ground within the limits of the Columbia and/or Willamette and/or Fraser Rivers and/or Suez Canal and/or Manchester Ship Canal or its connections and/or in the River Mersey above Rock Ferry Slip, such grounding not to be deemed a stranding, but Underwriters to pay for any damage which may be proved to have directly resulted therefrom.

In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage. Including risk of craft and boats to and from the ship or vessel each craft or boat to be deemed a separate risk.

All questions of liability arising under this policy are to be governed by the laws and customs of England. This Policy is issued in duplicate. Freight warranted free from any claim consequent upon loss of time whether arising from a peril of the sea or otherwise.

The preceding clauses and all clauses annexed hereto or stamped hereon shall control other printed conditions inconsistent with the same.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Freight Goods and Merchandise from the time when the Goods and Merchandise shall be laden on board the said Ship or Vessel Craft or Boat *as above* and continue until the said Goods and Merchandise be discharged and safely landed at *as above* AND that it shall be lawful for the said Ship or Vessel in the Voyage so insured as aforesaid to proceed and sail to and touch and stay at any Ports or Places whatsoever without prejudice to this Insurance AND touching the Adventures and Perils which the said Company is content to bear and does take upon itself in the Voyage so Insured as aforesaid they are of the Seas Men-of-War Fire Enemies Pirates Rovers Thieves Jettisons Letters of Mart and Counter Mart Surprisals Takings at Sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality soever Barratry of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof AND in case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labour and travel for in and about the Defence Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance the charges whereof the said Company will bear in proportion to the sum hereby insured AND (it is expressly declared and agreed that the acts of Insurer or Insured in Recovering Saving or Preserving the Property Insured shall not be considered a waiver or acceptance of abandonment) AND it is declared and agreed that Corn Fish Salt Saltpetre Fruit Flour Rice Seeds Hides Skins and *Molasses* ———— shall be and are warranted free from average unless general or the Ship be stranded sunk or burnt or unless caused by collision with any other Ship or Vessel and that Sugar Tobacco Hemp and Flax shall be and are warranted free from average under Five Pounds per centum and that all other Goods and also Ship and Freight shall be and are warranted free from average under Three Pounds per centum unless general or the Ship be stranded sunk or burnt.

It is hereby understood and agreed that in case of claim for loss or damage to the interest insured under this policy same shall be reported as soon as goods are landed or loss known to Joseph Hadley Esq. No. 1 Cornhill E. C. London or Messrs. Brodrick Leitch & Kendall No. B 18 Liverpool and London Chambers Liverpool; and that all claims hereunder shall be paid at the office of this Company in San Francisco or at the office of Messrs. Brown Shipley & Company London upon certificate of loss signed by Joseph Hadley Esq. or Messrs. Brodrick Leitch & Kendall.

In Witness Whereof the FIREMAN'S FUND INSURANCE COMPANY has caused these presents to be signed by its duly authorized officers

in the CITY OF SAN FRANCISCO, STATE OF CALIFORNIA, this ———— day of ———— one thousand nine hundred and ————

Not valid unless countersigned by GEORGE E. BILLINGS, Marine Agent.

A. M. FOLLANSBEE, Jr.,
Marine Secretary.

WM. J. DUTTON,
President.

ENGLISH CARGO

FIREMAN'S FUND INSURANCE COMPANY

—OF—

SAN FRANCISCO, CALIFORNIA

No. 307264

Date August 7, 1912.

Vessel

Str. "Pleiades"

Assured

Trojan Powder Co.

£ $35,000 *at* ½ % %

£ $175.—

Head Office, Company's Building
California and Sansome Streets.

Plaintiff's Exhibit No. 3 Bill of Lading Issued by California-Atlantic Steamship Company to Trojan Powder Co

CALIFORNIA-ATLANTIC STEAMSHIP CO.

(Steam Ship) ESTES S.S. CO., Owners, agents

and

PANAMA RAILROAD CO.

As Common Carriers on Rail Route.

Marks and Numbers

Received by the CALIFORNIA-ATLANTIC STEAMSHIP CO.

For the port of San Francisco

From Trojan Powder Company

upon the vessel aforesaid, and bound for the Atlantic terminal ports named, and accessible as thereto or so far as cargo may consistently safely navigate, or approach upon same and customary draught, exclusive and unless otherwise noted, viz:—

(consigned to order)

Freight for delivery at Port Gatun

to be transported to connecting "Railroad"

and there delivered to the order of the consignee, or assigns, on payment of freight and charges, and in accordance with the following provisions:

Rates and Conditions

Freight to be paid as follows:

Value declared by shipper not exceeding $100 per ton of 2000 lbs.

Weight, measurement, quantity, quality, contents and value unknown.

Freight from San Francisco to Gatun

Rate

Subject to Classification and Rules in effect at time of shipment.

Weight

Measurement

Quantity

Quality

Contents

Value

Advances

Landing charges

Primage

Total

Freight payable at Destination

Freight payable at San Francisco

Freight payable at Destination

Time

Demurrage

Landing charges

Primage

Total

Received subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

(The signature of the shipper to this Bill of Lading is a warranty that the goods are properly classified, described, packaged, marked and labeled, and are in proper condition for transportation according to the applicable regulations of the Interstate Commerce Commission.)

Shipper's weight, load and count

Shipper's agent

For the Company

Agent

(The Agent's signature to this Bill of Lading is binding upon the Company only when countersigned by the Agent.)

Received in apparent good order and condition (except as otherwise noted) from the Shipper the property described in the margin hereof, to be transported to the port of destination as mentioned above, and there delivered to the consignee or assigns, subject to the terms and conditions hereof. One of the Bills of Lading must be surrendered duly endorsed in exchange for the property or the delivery thereof.

Rates and conditions shall be deemed subject to the Classifications and regulations established by the Interstate Commerce Commission, or lawfully established by the Railroad Company, in force at the time of shipment. If rates have not been agreed upon or cannot be ascertained by the parties entitled thereto, the property shall be carried at the lowest rates and conditions as may be given to shippers of like goods by the Railroad Company in case of like shipments. Property not specifically described in this Bill of Lading, or contained in packages not apparent from the exterior, shall be at the risk of the owner thereof as to any loss or damage thereto arising from the nature of the property or the defective condition of the packages.

Rates stated herein are based upon the Classifications and regulations established by the Interstate Commerce Commission, or lawfully established by the Railroad Company, in force at the time of shipment. If rates have not been agreed upon or cannot be ascertained by the parties entitled thereto, the property shall be carried at the lowest rates and conditions as may be given to shippers of like goods by the Railroad Company in case of like shipments. Property not specifically described in this Bill of Lading, or contained in packages not apparent from the exterior, shall be at the risk of the owner thereof as to any loss or damage thereto arising from the nature of the property or the defective condition of the packages. Property shall be delivered at the port of destination only to the consignee or assigns, and only upon payment of freight and charges, and in accordance with the following provisions:

Delivery. Delivery at destination will be made to the consignee or assigns, or to the person designated by the consignee or assigns in writing, at the pier or wharf at which the vessel is usually discharged, or at such other place as the Railroad Company may elect, and the consignee assumes all responsibility and expense in receiving the property promptly as it arrives. If the consignee or assigns cannot be found, or refuses to receive the property, or if the consignee or assigns fail to pay the freight and charges, or if any question arises between the consignee or assigns and the Railroad Company, the Railroad Company may, at its option, store the property at the risk and expense of the consignee or assigns, and such storage charges may be enforced by the Railroad Company by sale of the property, or any part thereof, at public auction, after notice of the time and place of such sale has been published once in a newspaper published in the city or town where such sale is to be held, or if no newspaper is published in such city or town, then in a newspaper published in the nearest city or town, and by posting such notice in three public places in such city or town, at least ten days before such sale. The Railroad Company may bid at such sale and become the purchaser of the property. The proceeds of such sale shall be applied to the payment of the freight and charges, and the expenses of storage, notice and sale, and the surplus, if any, shall be paid to the consignee or assigns. The Railroad Company shall not be liable for any loss or damage occurring after the property is ready for delivery, or for any delay caused by the consignee or assigns in receiving the property when delivered, or by the Railroad Company in storing the property for the benefit of the consignee or assigns.

Lien. The Railroad Company shall have a lien upon the property for all freight and charges, and for the amount of any loss or damage for which the consignee or assigns may be liable to the Railroad Company, and may retain possession of the property until such freight, charges, loss or damage are paid or satisfied.

Claims. As a condition precedent to recovery for loss or damage to property, written notice of the claim must be given to the Railroad Company at the point of delivery before the property has been removed or mingled with other property, and before any change has occurred in the condition of the property, except such change as may be necessary in the ordinary course of transportation, and such notice must be given within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; and suit must be brought within two years after the delivery of the property, or, in case of failure to make delivery, then within two years after a reasonable time for delivery has elapsed.

Limitation of Liability. The Railroad Company shall not be liable for any loss or damage occurring while the property is in the possession of any other railroad or transportation company, but any such carrier, or the Railroad Company, may limit its liability to the amount actually received for the transportation of the property.

Perishable Property. The Railroad Company shall not be liable for any loss or damage to perishable property, unless caused by its negligence.

Dangerous Articles. The Railroad Company shall not be liable for any loss or damage to property of a dangerous character, or which, from its nature or condition, is liable to injure other property, or to endanger the safety of persons or property, and the shipper shall be liable for all loss or damage caused by the shipment of such property.

Stoppage in Transit. The Railroad Company shall have the right to stop the property in transit at any point, and to change the destination or the consignee, upon the written order of the shipper or consignee, but such right must be exercised before the arrival of the property at the point of destination, or before the delivery thereof to the consignee or assigns, and the Railroad Company shall not be liable for any loss or damage occurring after the property is ready for delivery, or for any delay caused by the consignee or assigns in receiving the property when delivered, or by the Railroad Company in storing the property for the benefit of the consignee or assigns.

Transportation Over Connecting Lines. The Railroad Company shall not be liable for any loss or damage occurring on the line of any connecting railroad or transportation company, but any such carrier, or the Railroad Company, may limit its liability to the amount actually received for the transportation of the property.

Delay. The Railroad Company shall not be liable for any loss or damage occurring from delay, unless caused by its negligence.

Notice. Notice to the consignee or assigns may be given by mailing the same to the address given in this Bill of Lading, or by delivering the same to the consignee or assigns, or to the person designated by the consignee or assigns in writing.

Time. Time shall be deemed of the essence of this contract, and the Railroad Company shall not be liable for any loss or damage occurring after the property is ready for delivery, or for any delay caused by the consignee or assigns in receiving the property when delivered, or by the Railroad Company in storing the property for the benefit of the consignee or assigns.

Transportation Over Connecting Lines. The Railroad Company shall not be liable for any loss or damage occurring on the line of any connecting railroad or transportation company, but any such carrier, or the Railroad Company, may limit its liability to the amount actually received for the transportation of the property.

Delay. The Railroad Company shall not be liable for any loss or damage occurring from delay, unless caused by its negligence.

Notice. Notice to the consignee or assigns may be given by mailing the same to the address given in this Bill of Lading, or by delivering the same to the consignee or assigns, or to the person designated by the consignee or assigns in writing.

Time. Time shall be deemed of the essence of this contract, and the Railroad Company shall not be liable for any loss or damage occurring after the property is ready for delivery, or for any delay caused by the consignee or assigns in receiving the property when delivered, or by the Railroad Company in storing the property for the benefit of the consignee or assigns.

In Witness Whereof, [illegible] Bills of Lading, all of one tenor, the [illegible] being accomplished, the others to stand void.

Dated at San Francisco, this 17th day of August, 1911.

Witness my hand and seal of office this [illegible] day of [illegible], 1911.

Agent.

Shipper.

For California-Atlantic Steamship Co. and Connecting Lines

CONDITIONS OF THIS BILL OF LADING.

1. The carriers shall have liberty to transfer the goods to and transport them by lighters, barges, or any other vessel than that named, to lighter from steamer to steamer and from steamer to shore, or from shore to steamer, and shall have liberty to sail without pilots, to tow and assist vessels in any situation, and go to or stop at any port or ports en route or beyond, and to deviate, with like privilege to stop. It is agreed that the goods may be lightered, ferried or carted to the consignee or a connecting carrier in Bay of Panama or elsewhere at the owner's risk. The Panama Railroad Company will not be responsible for loss or damage to goods or treasure from fire in cars, in warehouse, on wharf, or in lighters in the Bay of Panama.

2. No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits conveyance from any point of transhipment, and in case the whole or any part of the property specified herein be prevented by any cause from going from port in the first steamer of the line stated, leaving after the arrival of such property at the port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary by any other steamer or route.

3. No carrier, or the property of any, shall be liable for gold, silver, precious stones or metals, jewelry, or treasure of any kind, bank notes, securities, silks, furs, laces, pictures, plate, china, glass or statuary, unless bills of lading are signed therefor, in which their nature and value are expressed and extra freight expressed and paid for the assumption of extraordinary risk nor for any loss or damage arising from any of the following causes, viz.: fire from any cause, on land or on water, jettison, ice, freshets, floods, weather, pirates, robbers, or thieves, acts of God or of the country's enemies; riots, strikes, or stoppage of labor, collisions, explosions, accidents to boilers or machinery, or any latent defect in hull, machinery or appurtenances; or unseaworthiness of the ship, even existing at time of shipment or sailing on the voyage, provided the owners have exercised due diligence to make the vessel seaworthy; stranding, straining, any accident on or perils of the seas or other waters, or of steam or inland navigation; restraints of governments, legal process, claims of ownership by third parties, detention or accidental delay; want of proper cooperage or mending, insufficiency of package in strength or otherwise, use of hooks, rust, dampness, loss in weight, leakage, breakage, sweat, blowing, bursting of casks or packages from weakness or natural causes, evaporation, vermin, frost, heat, smell, contact with or proximity to other goods, natural decay, or exposure to weather; nor for any act, neglect or default whatsoever of the pilots, masters, mariners or other servants or agents of the steamers, or for loss or damage of any kind on goods packed in bales or whose bulk or nature requires them to be carried on deck or on open cars, or for the condition of packages or any deficiency in the contents thereof, if receipted by the consignees as in good order; or for any injury that may happen under any circumstances to, or for the death of any living creature that may be embarked, or sent for embarkation, on board the carriers.

4. All liability under this Bill of Lading shall be determined on the basis of the actual market value of the goods at the time of ship's entry at port of destination, but the Carriers shall not be liable for any value exceeding one hundred dollars ($100.00) U. S. Gold upon each package, unless the value exceeds that amount, is so expressed in the Bill of Lading, and extra freight paid thereon, as per tariffs; and shipper covenants that such claims shall in no case exceed $100 for loss of or damage to or for conversion of any one of said packages unless a greater package valuation be written hereon.

5. Explosive, inflammable, or other dangerous articles may be transported, if the carrier chooses, on deck or elsewhere, and they shall, in all cases, be at the owner's risk. If any such articles be secretly delivered to the carrier, the shipper shall be responsible for any damage resulting therefrom, and such articles may be destroyed by the carrier without incurring any liability therefor.

6. All articles named in this bill of lading are subject to charges for necessary cooperage and repairs. No liability shall exist for wrong carriage or delivery of goods marked with initials or imperfectly marked, unless name and address of consignee be given in writing at time of shipment; such marking being agreed to be taken as proof of contributory negligence. Should it be found on the cargo being discharged that goods have been landed without marks or with marks differing from those on the bill of lading, or with marks and numbers not distinguishable, the same shall be apportioned to the different lots, and consignees shall conform to such allotment. All claims for damage to goods must be made and the nature and extent thereof fully disclosed, in the presence of the agent of the company having the same then in custody, before they are removed from the station or wharf. Unless written demand for damage shall be made upon the carrier liable therefor, or upon the carrier which actually delivered the goods, within ten days after delivery, all claims for damage shall be taken to have been waived, and no suit shall thereafter be maintainable to recover the same. No agent or employee shall have authority to waive such demand.

7. Also that if the ship is prevented by Quarantine from reaching her destination, or making due delivery of the goods, or is detained at quarantine, the goods may be forthwith, without previous notice to shipper, owner or consignee, discharged into depots, lazarettes, hulks, crafts or lighters at the risk and expense of shipper, owner and consignee, all and any of them, and such discharge shall be deemed a full and final delivery of the goods, all risk, responsibility and expenses of the carrier therefor, as carriers, bailee or otherwise, ending as soon as the goods are delivered from the ship's tackle, and all expenses thereby or thereafter incurred, and all increased cost of such delivery shall be paid by shipper, owner and consignee, all and any of them, the carrier retaining a lien on the goods therefor; but should the vessel or goods not be admitted, or such discharge be impracticable, or so in the master's opinion, the carrier may forthwith without previous notice proceed to the nearest safe port, or at ship's option to the nearest safe port to which the ship is bound, at the risk and expense of shipper, owner and consignee, all and any of them, and there land the goods as if at the original port of discharge, at the risk and expense of shipper, owner and consignee, all and any of them, he and they paying freight from the original port of discharge, and the carrier retaining a lien on the goods therefor and for all costs, charges and expenses incurred, and for all increased cost of delivery; and all risks, and expenses incurred thereafter shall be on account of shipper, owner and consignee. The several carriers shall have a lien upon the goods specified in this bill of lading for all arrearages of freight and charges due by the same owners or consignees on other goods. In case of loss, detriment or damage to the goods or delay in the transportation thereof, imposing any liability hereunder, the carrier in whose actual custody they were at the time of such loss, damage, detriment or delay, shall alone be responsible therefor. The receipt of any carrier for the goods shall be prima-facie evidence of the condition in which he received them in a suit against any other carrier. None of the carriers under this bill of lading will be responsible for deterioration or damage to cargo caused by fumigation or disinfection ordered by the sanitary authorities.

8. When the loading, transport, transhipment or delivery is prevented in consequence of ice, weather, epidemic, quarantine, sanitary measures, blockade, war, sedition, strikes, troubles, labor agitations, and all analogous circumstances whatever, the Captain, the Company or the Agents shall be entitled to load, discharge, tranship, put into warehouse or quarantine depot, or into a lighter, hulk or craft, and to deliver all or any part of the goods, whether the terminus of the voyage or not, and all risks whatsoever, and all expenses of transhipment or warehousing of Customs, including Surtaxe d'Entre Pot, and all extra expenses of whatsoever kind incurred in consequence of the above circumstances will be entirely for account of the shipper, consignee or party claiming the goods; even though some part of such extra expenses may be occasioned by the fault of the Captain or shipowner; the Master and Owner being discharged from all responsibility on the goods being placed in charge of the Custom House or any Mercantile Agent or Consul.

9. The goods shall be received by the owner or consignee at the station or wharf of the carrier at the ultimate point of delivery, in lots or parts of lots, and if not taken away within twenty-four hours after arrival may, at the option of the delivering carrier, be sent to a warehouse, or be permitted to lie where landed, all at the expense and risk of the shipper, owner or consignee. If no address of a person at the ultimate point of delivery, immediately entitled to such delivery be disclosed by this bill of lading, the same must be furnished by the shipper, owner or consignee, in writing, to the terminal carrier, before the time at which in ordinary course of transportation the goods should arrive at such point. A failure to do this or remove the goods within twenty-four hours after their arrival shall, in case of any subsequent loss of or injury to the latter, be treated as conclusive proof of negligence on the part of the shipper, owner or consignee, which contributed to such loss or injury. Negligence shall not be presumed as against any carrier under this bill of lading, and no liability shall exist therefor without actual and affirmative proof thereof.

10. If destination is a seaport, the ship may commence discharging immediately on arrival and discharge continuously, the Collector of the Port being hereby authorized to grant a general order for discharge immediately on arrival. Goods to be delivered at ship's tackles, and all charges from thence, including quay expenses, weighing, and delivering to be borne by consignee. If the goods be not taken by the consignee within such time as is provided by the regulations of the port of discharge, they may by the carrier be sent to store, permitted to lie where landed, or returned to the port of shipment, at the expense and risk of the owner, shipper or consignee.

11. Cargo for Callao to be delivered to the Custom House or Muelle Darsena, under receipt, which receipt will relieve the carrier from all responsibility. Five shillings per ton extra will be charged on all goods landed by the Muelle Darsena Co. at Callao, but the Steamship Company's responsibility shall cease immediately the goods have left the steamer's tackle. In the other ports of South America, and in the ports of Central America and Mexico, the cargo will be discharged by the agent of the carrier, for account and risk of owners of the goods, the landing charges being for their account, and the articles named, in this bill of lading shall be taken away by the consignee thereof immediately after the arrival of the steamer at the port of destination, or the same may be stored at the expense and risk of the owner, shipper or consignee thereof, or carried forward to steamer's destination and landed on her return for account and at the risk and expense of whom it may concern. In case the surf or state of the weather or other conditions upon the arrival of the steamer, shall be such as to render it, in the judgment of the Captain, impracticable to land goods at the ports to which they are destined, or if, from delay or neglect of the consignees, or other causes, the goods or any part thereof, be not transshipped, taken from alongside or landed at any port, the same may be discharged into quarantine depot, or into a lighter, hulk or craft, or be taken to convenient port, and be transshipped, or landed and stored and reshipped, or retained on board, and be forwarded or delivered on a subsequent opportunity, in either case at the risk and expense of the consignee and/or owner of the goods. It is also expressly stipulated and agreed that the within described freight shall not be landed without the proper permission of the Custom House authorities of the port of destination, and if the consignees fail to obtain this, the cargo shall be conveyed back to Ancon for their account and risk at regular through rates. It is understood and agreed that all charges demanded of the steamer for landing this cargo shall be paid by the consignees of same. The carriers are not responsible in respect of goods for France for any Surtaxe d'Entre Pot. In the event of the goods being consigned with option of delivery at another port than the port of consignment named hereon, the port of delivery selected is to be declared at the first of said ports called at by the steamer, within one hour from the time of the steamer's arrival at that port. Failing such declaration, the carriers reserve to themselves the right to discharge the goods at the port of consignment, such goods thereafter to be at the risk and expense of the consignees or owners of the goods.

12. In case of the blockade or interdict of the port of delivery or transhipment, or if, without such blockade or interdict, the entering of the port should be considered by the Master unsafe by reason of disease, war, or disturbances, he is to have the option of landing the goods at any other port which he may consider safe, at shipper's or consignee's risk and expense; and on the goods being placed in charge of the Custom House or any mercantile agent or consul, and a letter being put into the post addressed to the shipper or consignee if named, stating the landing and with whom deposited, the goods to be at shipper's or consignee's risk and expense, and the master and owner discharged from all responsibility. The California-Atlantic Steamship Company reserves the right, in event of any trouble arising between the Company and any of the Central American Republics, to store the cargo at the risk and expense of owner, shipper, and/or consignee until such time as it may be convenient to carry the same forward for delivery.

13. Carrier shall have a lien on said property for all fines imposed on it and for all expense to it resulting from shipper's failure to furnish proper Consular or Custom House papers in due time or resulting from other errors or omissions of shippers, and all such fines and expenses shall be reimbursed to Carrier by consignee before said property shall be delivered to him.

14. It is agreed that the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the connecting steamship company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein.

15. It is agreed that this bill of lading, duly endorsed, shall be given up to the last carrier, if required, in exchange for delivery order.

16. That merchandise on wharf or in warehouse awaiting shipment, transhipment or delivery be at owner's risk of loss or damage by fire, flood and/or the giving away or falling or destruction in whole or part of the warehouse or the wharf or any structure thereon, not happening through the fault or negligence of carrier or representative.

17. It is expressly stipulated and agreed that the California-Atlantic Steamship Company shall not be liable for destruction of or damage to goods by fire while upon its vessel, or before loading thereon or after unloading the same therefrom, unless such fire is caused by the design or neglect of said Company.

18. In the event of any cargo being accepted and carried with freight charges to collect at destination, and if through insufficiency of containers or any other cause whatsoever, such Cargo or any part thereof is refused by the connecting carriers, and the Carrier having such Cargo in possession at the time of such refusal is compelled to return the same to the port of origin or otherwise dispose of the same, all freight and other charges and all expenses of every nature whatever, that may be reasonably incurred in the rehandling and/or discharge of said Cargo, shall be a charge and lien upon and against said Cargo, payable by the Shipper, Owner and/or Consignee, prior to taking delivery or effecting reshipment of such Cargo.

19. It is further mutually agreed that all questions arising under this bill of lading are to be governed by the laws of the country of the carrier to whose acts such questions are attributable.

Plaintiff's Exhibit No. 3—Notice of Abandonment August 29, 1912, Trojan Powder Co. to Fireman's Fund Insurance Co.

PLAINTIFF'S EXHIBIT No. 3.

NOTICE OF ABANDONMENT.

To the Fireman's Fund Insurance Company of San Francisco.

Gentlemen:—

Please take notice: That the Trojan Powder Company insured in the sum of Thirty-five Thousand 00/100 Dollars under your policy No. 307264, dated August 7th, 1912, on Six Thousand cases High Explosives laden on board the Ship or vessel called the Steamer "Pleiades," hereby abandons the said Six Thousand cases High Explosives laden on said vessel to your Company and claims of you as for a total loss under said policy.

The foregoing abandonment is made because the said Steamer "Pleiades" laden with said explosives on or about the 16th day of August, 1912, while on a voyage from San Francisco Bay to Balboa was wrecked at or near Cape San Lazaro—Lower California as the result of which the said Six Thousand cases of High Explosives became and are a total loss.

Dated, San Francisco, August 29, 1912.

TROJAN POWDER COMPANY,

By W. P. Mulhern,

Manager.

[Endorsed]: Filed Jul. 30, 1917. Walter B. Maling, Clerk. [153]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Petition for Allowance of Writ of Error.

Fireman's Fund Insurance Company, a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the decision of the court and the judgment entered herein on the 21st day of October, 1915, comes now by Ira A. Campbell, its attorney, and petitions said court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon such writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Defendant and Petitioner.

[Endorsed]: Filed Dec. 17, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [154]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now Fireman's Fund Insurance Company, a corporation, defendant herein, and makes and files the following assignment of errors upon which it will rely in the prosecution of its writ of error in the above-entitled cause.

I.

The above-entitled court erred in holding and deciding that plaintiff was entitled to a judgment in the sum of $4,050, and interest from the 15th day of October, 1912.

II.

The above-entitled court erred in holding and deciding that the steamer "Pleiades" never resumed,

or otherwise performed, her voyage, and that the said voyage was wholly abandoned by said steamer.

III.

The above-entitled court erred in holding and deciding that the nature of the goods in question and the purposes for which said goods were intended would have rendered it unreasonable to have detained said goods until the completion of repairs.

IV.

The above-entitled court erred in holding and deciding that because of a peril insured against by said defendant, the plaintiff was compelled to reship and forward the cargo in question [155] on the steamer "Mackinaw," belonging to the California-Atlantic Steamship Company, and pay therefor additional freight in the sum of $4,050.

V.

The above-entitled court erred in holding and deciding that the additional freight paid by said plaintiff to the said carrier, California-Atlantic Steamship Company, for the transportation of said cargo to destination was caused and occasioned by the terms of a contract entered into by and between said carrier and plaintiff of which contract said defendand had no notice.

VI.

The above-entitled court erred in holding and deciding that it is the law of England that in case of marine insurance on merchandise, when in consequence of a peril insured against, an extra freight must be paid by the cargo owner to bring said merchandise to the port of destination, such expense is a

loss directly due to such peril insured against for which the insurer is liable.

VII.

The above-entitled court erred in holding and deciding that under the policy and the facts admitted by the pleadings in this cause, in connection with the facts found by said court, it is the practice and custom of underwriters in England to pay the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight originally paid as a loss directly due to such peril.

VIII.

The above-entitled court erred in not holding and deciding that because of the fact that the original freight paid by said plaintiff for the carriage of said cargo to destination was $4,950, and the second freight paid by said plaintiff for the transportation of said cargo to destination was the sum of $4,050, there was no excess [156] of freight paid by plaintiff over and above the expense necessary to carry said cargo to destination if no peril had intervened.

IX.

The above-entitled Court erred in holding and deciding that under the law of England, it was the obligation of the carrier, in consideration of the original freight, whether prepaid or not, to complete said voyage with said steamer "Pleiades" upon the completion of the repairs to said steamer necessitated by such stranding and to transport the said cargo to its port of destination without requiring

the payment of the second freight therefor.

X.

The above-entitled Court erred in holding and deciding that the reshipment and forwarding of said cargo on said steamer "Mackinaw" to said port of Balboa, and the payment of additional freight were not voluntary on the part of said plaintiff, and were caused by perils of the sea insured against by said policy and under the law of England did constitute a loss, charge and liability under the terms and conditions of said policy.

XI.

The above-entitled Court erred in not holding and deciding that the payment of a second freight to the said carrier for a transshipment and forwarding of said cargo to destination in another vessel was caused by the provisions of the contract entered into by and between the plaintiff and the purchaser of said cargo, of which said contract defendant had no notice.

XII.

The above-entitled Court erred in holding and deciding that under the law of England, if by reason of the specific purpose for which said goods were intended, said goods could not be detained at said port of San Francisco until the completion of the repairs [157] of said vessel, and hence forwarded in said steamer to said port of destination, and if upon reshipment of said goods to destination, an additional freight was paid by plaintiff, such extra freight did constitute a loss, charge and liability

under said policy, and was caused by perils insured against by said policy.

XIII.

The above-entitled Court erred in holding and deciding that under the law of England the payment of said extra freight was due to a peril insured against by said policy and resulted in a loss which said policy did cover.

XIV.

The above-entitled Court erred in holding and deciding that under the law of England there was no concealment by the plaintiff from the defendant of the facts material to the risk, and said policy was not voided.

XV.

The above-entitled Court erred in not holding and deciding that the stranding of the S. S. "Pleiades" was not the proximate cause of the second or additional payment of freight by said plaintiff to the said California-Atlantic Steamship Company.

XVI.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that the S. S. "Pleiades" was operated by the California-Atlantic Steamship Company, and while on said voyage with said insured cargo on board, and on the 16th day of August, 1912, stranded on the coast of Mexico, and was thereafter released with plaintiff's said cargo still on board in an undamaged condition, and returned to the port of San Francisco, where said cargo was stored in lighters,

said steamship was repaired, and on the 27th day of December, 1912, was redelivered to the California-Atlantic Steamship Company; that said California-Atlantic [158] Steamship Company went into bankruptcy about January first or second, 1913; that said steamship did not complete said voyage, which said request to so find is set forth in defendant's exception No. 6.

XVII.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that plaintiff reshipped said cargo in sound condition from San Francisco to Balboa on the 15th day of October, 1912, on board the steamer "Mackinaw," operated by the California-Atlantic Steamship Company; that it was necessary to forward said cargo at that time because, under the contract of sale if it were not delivered within a certain time, plaintiff was subject to a penalty of one-tenth of one per cent per day, and was liable to have the shipment refused by the purchaser upon the condition that the contract of sale provided for such delivery within such time, which said request to so find is set forth in defendant's exception No. 7.

XVIII.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that the reshipment of said cargo from San Francisco to Balboa on board the steamer "Mackinaw" was voluntary on the part of plaintiff, and was not caused by any perils insured against

by said policy, but was made to avoid the penalties of the contract of sale of said cargo, which said request to so find is set forth in defendant's exception No. 8.

XIX.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that at the time said cargo was reshipped on board said steamer "Mackinaw" [159] it was in as sound condition as when originally shipped on board said steamship "Pleiades," and was not in danger of loss or damage from any peril insured against by said policy, which said request to so find is set forth in defendant's exception No. 9.

XX.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was at all times herein mentioned the law and custom of England that underwriters in issuing a policy of insurance on a cargo, of the form issued by defendant to plaintiff, do not contract with reference to the bill of lading on which the cargo is shipped, nor do such bills of lading become a part of the contract of insurance unless incorporated therein; that said bill of lading was not incorporated in said policy of insurance, which said request to so find is set forth in defendant's exception No. 10.

XXI.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by de-

fendant, that it is and was during all times herein mentioned the law of England that an underwriter is not liable, under a policy of marine insurance, for a loss which is not proximately caused by the perils insured against, and, that where there is a succession of causes which must have existed in order to produce the loss, the last cause only must be looked to and the others rejected, although the result would not have been produced without them; that in cases of marine insurance only the *causa proxima* can be regarded, which said request to so find is set forth in defendant's exception No. 11.

XXII.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was during all times herein mentioned the law of England that [160] an underwriter on a policy of marine insurance on cargo is not liable for losses resulting from delay in the transportation of the insured cargo, which said request to so find is set forth in defendant's exception No. 12.

XXIV.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was during all the times herein mentioned the law of England that the voluntary reshipment of said cargo on said steamer "Mackinaw" and the payment of said additional freight did not constitute a loss, charge or liability under the policy of insurance covering said cargo,

which said request so to find is set forth in defendant's exception No. 13.

XXV.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was during all times herein mentioned the law of England that the inability of plaintiff, by reason of the purpose for which said insured cargo was intended and the contract under which it was sold, to detain said insured cargo at the port of San Francisco until the completion of the repairs to said S. S. "Pleiades," and to then forward it in said steamship to destination, did not make the additional freight paid by plaintiff for the reshipment of said cargo to destination by the steamer "Mackinaw" a loss, charge or liability under the policy of insurance covering the said cargo, as it was not caused by any peril insured against, which said request to so find is set forth in defendant's exception No. 14.

XXVI.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was at all times herein mentioned the law of England that [161] the inability of plaintiff, by reason of the nature of said cargo and the contract under which it was sold, to detain said cargo at the port of San Francisco until the completion of the repairs to said S. S. "Pleiades," and to then forward it to destination, did not make the aditional freight paid by plaintiff for the re-

shipment of the said cargo to destination by the steamer "Mackinaw" a loss, charge or liability under the policy of insurance covering the said cargo, for it was not due to any peril insured against by said policy, but resulted from the nature of the contract of carriage entered into with the California-Atlantic Steamship Campany, charterer of the S. S. "Pleiades," by which said original freight was prepaid, and was to be considered as earned, ship or goods lost or not lost at any stage of the entire transit, which said request to so find is set forth in defendant's exception No. 15.

XXVII.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was during all times herein mentioned the law of England that expenses incurred by or on behalf of an assured, under a policy of marine insurance, for the safety or preservation of the subject matter insured, other than general average and salvage charges, are particular charges, and that particular charges are not included in generl average; that expenses incurred in forwarding to destination goods insured under a policy of marine insurance are not particular average, which said request to so find is set forth in defendant's exception No. 16.

XXVIII.

The above-entitled Court erred in not holding and deciding, and in refusing to find as requested by defendant, that it is and was during all times herein

mentioned the law of England that [162] particular charges are only recoverable from underwriters on a policy of marine insurance when incurred after the arising of a peril insured against in order to prevent such peril causing a loss for which the underwriters would be liable if it were so caused, which said request to so find is set forth in defendant's exception No. 17.

XXIX.

The above-entitled court erred in holding and deciding, and in refusing to find as requested by defendant, that it is and was during all the times herein mentioned the law of England that the facts that the nature of said cargo and the contents under which it was sold would render it impossible to detain said cargo at the port of San Francisco during the period required for the completion of the repairs to said S. S. "Pleiades," and to then forward it to destination, constituted facts material to the risk, and the concealment thereof from plaintiff at the time said policy of insurance was issued constituted the concealment of fact material to the risk and voided the policy, which said request to so find is set forth in defendant's exception No. 18.

XXX.

The above-entitled court erred in refusing to make a finding, as requested by defendant, that there is no substantial evidence to support a finding against defendant as set forth in defendant's exception No. 19.

XXXI.

The above-entitled court erred in refusing to make a finding, as requested by defendant, that there is no

substantial evidence to support a judgment against defendant as set forth in defendant's exception No. 20.

XXXII.

The above-entitled court erred in refusing to make a [163] finding, as requested by defendant, that the substantial evidence will not support a judgment in favor of plaintiff as set forth in defendant's exception No. 21.

XXXIII.

The above-entitled court erred in refusing to make a finding, as requested by defendant, that the substantial evidence will not support a finding in favor of plaintiff as set forth in defendant's exception No. 22.

XXXIV.

The above-entitled court erred in refusing to make a finding, as requested by defendant, that there is no substantial evidence to support a judgment in favor of the plaintiff as set forth in defendant's exception No. 23.

XXXV.

The above-entitled court erred in denying the motion of defendant for an order dismissing the complaint, which motion was made upon the ground that the substantial evidence supports such order or judgment as set forth in defendant's exception No. 24.

XXXVI.

The above-entitled court erred in overruling defendant's objection to the offer by plaintiff of the contract of affreightment upon the ground that said contract of affreightment is incompetent, irrelevant

and immaterial and not binding upon the Insurance Company in any of the matters which are affected by the issues in this case, which said objection is more particularly referred to by defendant's exception No. 1.

XXXVII.

The above-entitled court erred in overruling defendant's objection to the question propounded to the witness W. P. Mulhern covered by defendant's exception No. 2, as follows: [164]

"Q. Do you know whether the vessel ever went out on that voyage?

Mr. CAMPBELL.—We object to that question as being irrelevant and immaterial."

The Court thereupon overruled defendant's said objection, to which defendant excepted, and defendant now assigns said exception to said ruling as defendant's exception No. 2.

XXXVIII.

The above-entitled court erred in overruling defendant's objection to the offer by plaintiff of the notice of abandonment, and in refusing to strike out said notice of abandonment, which said objection and motion is more particularly referred to by defendant's exception No. 3.

XXXIX.

The above-entitled court erred in overruling defendant's objection to the admission in evidence of the case of Pophan v. St. Petersburg Insurance Company, 10 Com. Cas. 31, upon the ground that said case is founded upon a form of policy which contains an express clause covering forwarding charges, the

clause in the policy in question being entirely distinct and different from the clause in the policy now under consideration, to which order in overruling said objection defendant excepted and now assigns said exception to said ruling as defendant's exception No. 4.

XL.

The above-entitled court erred in denying defendant's motion to strike out the evidence contained in the case of Pophan v. St. Petersburg Insurance Company, 10 Com. Cas. 31, which motion was made upon the grounds that the said case is immaterial, irrelevant and incompetent because the policy in said case contained a clause expressly covering forwarding, landing and warehouse expenses, which said motion is more particularly referred to by defendant's exception No. 5. [165]

XLI.

The above-entitled court erred in denying defendant's motion to strike out the evidence contained in the case of Pophan v. St. Petersburg Insurance Company, 10 Com. Cas. 276, which motion was made upon the ground that the said case is immaterial, irrelevant and incompetent because the policy in said case contained a clause expressly covering forwarding, landing and warehouse expenses, which said motion is more particularly referred to by defendant's exception No. 25.

XLII.

The above-entitled court erred in overruling defendant's objection to the court making the finding that said steamer "Pleiades" departed on her voy-

age in said policy mentioned, with said 6,000 cases of high explosives on board thereof, and while on said voyage, was on the 16th day of August, 1912, stranded off the coast of Mexico, and then and there, together with her cargo, was in danger of becoming a total loss; that the said plaintiff then and there abandoned said cargo to said defendant, which abandonment said defendant then and there refused to accept; that thereafter such salvage operations were undertaken as resulted in the floating and saving of said vessel and her cargo; that the said vessel was then and there in such damaged condition that she was unable to proceed upon her said voyage, but was brought back to the port of San Francisco for repairs, where the said cargo was discharged into lighters; that the said repairs on said vessel were not completed until December 27, 1912, and said steamer never resumed or otherwise performed said voyage, but said voyage was wholly abandoned by said steamer; that the nature of said goods, and the purpose for which said goods were intended, would have rendered it unreasonable to detain them until the completion of repairs, [166] which said objection is more particularly referred to by defendant's exception No. 26.

XLIII.

The above-entitled court erred in overruling defendant's objection to the court making the finding that in order to transport the said cargo to its port of destination, the said plaintiff was compelled to, and did, on the 15th day of October, 1912, reship and forward the said cargo on the Steamer "Mackinaw"

belonging to the said carrier California-Atlantic Steamship Company, and transported said cargo therein from the port of San Francisco to the port of Balboa, for which service the said plaintiff was then and there compelled to, and did pay, additional freight in the sum of Four Thousand and Fifty (4,050) Dollars, which said objection is more particularly referred to by defendant's Exception No. 27.

XLIV.

The above-entitled court erred in overruling defendant's objection to the court making the finding that it is the law of England that if, by reason of damage done to the ship, she cannot be repaired without great loss of time, the master is at liberty to procure another ship to transport the cargo to the port of destination; that there is no absolute obligation on the part of the master towards the owner of the goods to forward them in the original ship, which said objection is more particularly referred to by defendant's exception No. 28.

XLV.

The above-entitled court erred in overruling defendant's objection to the court making the finding that it is the law of England that where freight is paid in advance, and the contract provides that it is to be considered as earned, vessel or goods [167] lost or not lost at any stage of the entire transit, such freight is earned by the ship owner when the cargo is received on board, and the right of the ship owner thereto does not depend on the delivery of the cargo at the port of destination, which said objection is

more particularly referred to by defendant's exception No. 29.

XLVI.

The above-entitled court erred in overruling defendant's objection to the court making the finding that it is the law of England, that in case of marine insurance on merchandise, when, in consequence of a peril insured against, an extra freight must be paid by the cargo owner to bring said merchandise to the port of destination, such expense is a loss directly due to such peril insured against for which the insurer is liable, which said objection is more particularly referred to by defendant's exception No. 30.

XLVII.

The above-entitled court erred in overruling defendant's objection to the court making the finding that under the policy and the facts admitted by the pleading in the case at bar, in connection with the facts herein found by this court, it is the practice and custom of underwriters in England to pay the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight originally paid, as a loss directly due to such perils, which said objection is more particularly referred to by defendant's exception No. 31.

XLVIII.

The above-entitled court erred in overruling defendant's objection to the court making the finding that under the law of England, it was not the obligation of the carrier in consideration of the original freight whether prepaid or not, to complete said [168] voyage with said Steamer "Pleiades" upon the completion of the repairs to said steamer necessi-

tated by such stranding and to transport the said cargo to its port of destination without requiring the payment of the second freight therefor, which said objection is more particularly referred to by defendant's exception No. 32.

XLIX.

The above-entitled court erred in overruling defendant's objection to the court making the finding that the reshipment and forwarding of said cargo on said steamer "Mackinaw" to said port of Balboa, and the payment of additional freight, were not voluntary on the part of said plaintiff, and were caused by perils of the sea insured against by said policy, and under the laws of England did constitute a loss, charge and liability under the terms and conditions of said policy, which said objection is more particularly referred to by defendant's exception No. 33.

L.

The above-entitled court erred in overruling defendant's objection to the court making the finding that under the law of England, if, by reason of the specific purpose for which said goods were intended, said goods could not be detained at said port of San Francisco until the completion of the repairs of said vessel, and thence forwarded in said steamer to the port of destination, and if upon reshipment of said goods to destination an additional freight was paid by plaintiff, such extra freight did constitute a loss, charge and liability under said policy, and was caused by perils insured against by said policy, which said objection is more particularly referred to by defendant's exception No. 34.

LI.

The above-entitled court erred in overruling defendant's objection to the court making the finding that, under the law of [169] England, the payment of said extra freight was due to a peril insured against by said policy, and resulted in a loss which said policy did cover, which said objection is more particularly referred to by defendant's exception No. 35.

LII.

The above-entitled court erred in overruling defendant's objection to the court making the finding that, under the law of England, there was no concealment by the plaintiff from the defendant of facts material to the risk, and said policy was not voided, which said objection is more particularly referred to by defendant's exception No. 36.

WHEREFORE, the defendant and plaintiff in error herein prays that the judgment of the above-entitled court be reversed.

Dated: San Francisco, December 14, 1915.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: Filed Dec. 17, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [170]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error.

Upon motion of Ira A. Campbell, Esq., attorney for the above-named defendant, and upon filing a petition for a writ of error and an assignment of errors,

IT IS ORDERED that a writ of error be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be and the same is hereby fixed at Seven Thousand Five Hundred & no/100 ($7,500) Dollars, said bond to serve as a cost bond and a supersedeas bond on said writ of error.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Dec. 17, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [171]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:

That we, Fireman's Fund Insurance Company, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, as surety, are held and firmly bound unto Trojan Powder Company, a corporation, plaintiff, in the above-entitled action, in the full and just sum of Seven Thousand Five Hundred & no/100 ($7,500) Dollars, lawful money of the United States, to be paid to said plaintiff, Trojan Powder Company, a corporation, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 17th day of December, 1915.

WHEREAS the above-named defendant, Fireman's Fund Insurance Company, a corporation, has sued out a writ of error in the United States Circuit

Court of Appeals in and for the Ninth Circuit, to reverse the judgment entered in the above-entitled action in favor of the plaintiff therein, and against the defendant therein, for the sum of Four Thousand and Fifty (4050) Dollars, interest and costs.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Fireman's Fund Insurance Company, a corporation, [172] shall prosecute such writ of error to effect and answer all damages and costs if it shall fail to make good said plea, then this obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF said Fireman's Fund Insurance Company, a corporation, has caused its name to be hereunto subscribed and its corporate seal to be hereunto affixed by its officers thereunto duly authorized, and said Fidelity and Deposit Company of Maryland, has caused its name to be hereunto subscribed and its corporate seal to be hereunto affixed by its officers thereunto duly authorized, this 17th day of December, 1915.

[Seal]

FIREMAN'S FUND INSURANCE COMPANY,

By W. A. FOLLANSBEE, Jr.,

Marine Secretary.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By GUY LEROY STEVICK, (Seal)

Attorney in Fact.

Attest: EDWIN C. PORTER,

Agent.

The within bond is hereby approved this 17th day of December, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 17, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [173]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Order Staying Execution.

IT IS HEREBY ORDERED that execution, and all other proceedings in the above-entitled action, be and the same are hereby stayed pending the determination of the writ of error this day allowed in said cause.

Dated this 17th day of December, 1915.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Dec. 17, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [174]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Praecipe for Record on Writ of Error.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon Writ of Error heretofore perfected in this court and include in said transcript the following pleadings, proceedings and papers on file herein, to wit:

1. All of the pleadings in said cause and the exhibits attached thereto.

2. All those papers required by Sections 1 and 2 of Rule 14 of the United States Circuit Court of Appeals for the Ninth Circuit.

3. All exhibits introduced by either party; said exhibits to be sent up as original exhibits.

4. This praecipe.

Dated August 9th, 1917.

McCUTCHEN, OLNEY & WILLARD,
Attorneys for Defendant.

Service of the within praecipe for record, etc., and receipt of a copy is hereby admitted this 9th day of August, 1917.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 9, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [175]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Certificate of Clerk, U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States of America, in and for the Northern District of California, do hereby certify the foregoing one hundred seventy-five (175) pages, numbered from 1 to 175, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the Clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $83.70; that said amount was paid by the attorneys for defendant, and that the original writ of error and citation issued in said cause are hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of August, A. D. 1917.

[Seal] WALTER B. MALING,
Clerk U. S. District Court, in and for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk. [176]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States, for the Northern District of California, GREETING:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the

said District Court before you, or some of you, between Trojan Powder Company, a corporation, plaintiff, and Fireman's Fund Insurance Company, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said defendant and plaintiff in error, as by said complaint doth appear; and that, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if the judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, [177] to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the City and County of San Francisco, in the State of California, within thirty (30) days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States of America should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 17th day of December, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, for the Northern District of California.

By J. A. Schaertzer. [178]

Service of the within Writ of Error and receipt of a copy is hereby admitted this 17th day of December, 1915. NATHAN H. FRANK.

[Endorsed]: No. 15,660. In the District Court of the United States, Second Division, Northern District of California. Trojan Powder Company, a Corporation, Plaintiff, vs. Fireman's Fund Insurance Company, a Corporation, Defendant. Writ of Error. Filed Dec. 17, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. [179]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,660.

TROJAN POWDER COMPANY, a Corporation,
Plaintiff,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Defendant.

Citation on Writ of Error.

United States of America,
Northern District of California,—ss.

To the President of the United States of America, to the plaintiff above-named, Trojan Powder Company, a Corporation, and to Nathan H. Frank, its Attorney, GREETING:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, State of California, within thirty days from and after the date this citation bears, pursuant to a Writ of Error filed in the office of the Clerk of the United States Circuit Court, for the Northern District of California, in the above-entitled cause, wherein Trojan Powder Company, a corporation, is plaintiff, and Fireman's Fund Insurance Company, a corporation, is defendant, to show cause, if any there be, why the judgment made

and rendered in the above-entitled cause on the 21st [180] day of October, 1915, against the said Fireman's Fund Insurance Company, as defendant, in said Writ of Error mentioned, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 17th day of December, 1915.

WM. C. VAN FLEET,
United States District Judge for the Northern District of California.

[Seal] Attest: WALTER B. MALING,
Clerk of the Above-entitled Court.
By J. A. Schaertzer,
Deputy Clerk. [181]

Service of the within Citation on Writ of Error and receipt of a copy is hereby admitted this 17th day of December, 1915.

NATHAN H. FRANK.

[Endorsed]: No. 15,660. In the District Court of the United States, Second Division, Northern District of California. Trojan Powder Company, a Corporation, Plaintiff, vs. Fireman's Fund Insurance Company, a Corporation, Defendant. Citation on Writ of Error. Filed Dec. 17, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy. Clerk.

[Endorsed]: No. 3037. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff

in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed August 22, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including February 5, 1916, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above-named may have to and including the 5th day of February, 1916, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 14, 1916.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. C. VAN FLEET,
District Judge.

Dated January 15th, 1916.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, etc., Plaintiff in Error, vs. Trojan Powder Company, etc., Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jan. 15, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including February 29, 1916, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that

the plaintiff in error above named may have to and including the 29th day of February, 1916, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 3d, 1916.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.
NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. C. VAN FLEET,
District Judge.

Dated February 3d, 1916.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Feb. 3, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Plaintiff in Error,
vs.
TROJAN POWDER COMPANY, a Corporation,
Defendant in Error.

Stipulation and Order Enlarging Time to and Including March 22, 1916, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 22d day of March, 1916, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 28, 1916.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.
NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. C. VAN FLEET,
District Judge.

Dated February 29th, 1916.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Feb. 29, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including April 15, 1916, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 15th day of April, 1916, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 20th, 1916.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. C. VAN FLEET,
District Judge.

Dated March 20, 1916.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fire-

man's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Mar. 21, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error,

Stipulation and Order Enlarging Time to and Including June 15, 1916, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 15th day of June, 1916, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 13th, 1916.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,
United States Circuit Judge, Ninth Judicial Circuit.

Dated April 14th, 1916.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Apr. 14, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including July 15, 1916, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 15th day of July, 1916, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated June 14th, 1916.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. H. HUNT,
Judge.

Dated June 14, 1916.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jun. 14, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,
Defendant in Error.

Stipulation and Order Enlarging Time to and Including September 15, 1916, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that

the plaintiff in error above-named may have to and including the 15th day of September, 1916, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 10, 1916.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.
NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,
Judge.

Dated July 11th, 1916.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jul. 11, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Plaintiff in Error,
vs.
TROJAN POWDER COMPANY, a Corporation,
Defendant in Error.

Stipulation and Order Enlarging Time to and Including November 1, 1916, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 1st day of November, 1916, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 14th, 1916.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.
NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. C. VAN FLEET,
Judge.

Dated September 11th, 1916.

[Endorsed]: No. ——. Circuit Court of Appeals. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order. Filed Sep. 12, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN LUMBER COMPANY, a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including January 5, 1917, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 5th day of January, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 23d, 1916.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,
Judge.

Dated October 24, 1916.

[Endorsed]: No. ——. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Oct. 24, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including January 15, 1917, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 15th day of January, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, January 3, 1917.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. H. HUNT,
Judge.

Dated January ——, 1917.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jan. 4, 1917. F. D. Monckton, Clerk,

---

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including January 31, 1917, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 31st day of January, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, January 12, 1917.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.
NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,
Judge.

Dated January 12, 1917.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jan. 12, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including February 13, 1917, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 13th day of February, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, January 29th, 1917.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,
Judge.

Dated January 29th, 1917.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company Plaintiff in Error, vs. Trojan Powder Company, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jan. 29, 1917. F .D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including February 27, 1917, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 27th day of February, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 12, 1917.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,
Judge.

Dated February 13, 1917.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Feb. 13, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,
Defendant in Error.

Stipulation and Order Enlarging Time to and Including March 10, 1917, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 10th day of March, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, February 26th, 1917.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.
NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,
Judge.

Dated February 26th, 1917.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Feb. 26, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including April 5, 1917, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 5th day of April, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 8, 1917.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.
NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,
Judge.

Dated March 9, 1917.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Mar. 9, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including April 20, 1917, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 20th day of April, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 4th, 1917.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.
NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,
Judge.

Dated April 4, 1917.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Apr. 4, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Plaintiff in Error,
vs.
TROJAN POWDER COMPANY, a Corporation,
Defendant in Error.

Stipulation and Order Enlarging Time to and Including May 8, 1917, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the

plaintiff in error above named may have to and including the eighth day of May, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 18, 1917.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.
NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,
Judge.

Dated, April 19, 1917.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Apr. 19, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including June 8, 1917, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the eighth day of June, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, May 8th, 1917.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.
NATHAN H. FRANK,
IRVING H. FRANK (N. H. Jr.)
Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,
Judge.

Dated May 8, 1917.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed May 8, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Defendant in Error.

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Order Enlarging Time to and Including June 20, 1917, to Docket Cause.

IT IS HEREBY ORDERED that the plaintiff in error above named may have to and including the 20th day of June, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated June 8th, 1917.

WM. W. MORROW,

Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance, Plaintiff in Error, vs. Trojan Powder Company, Defendant in Error. Order

Enlarging Time for Docketing Cause on Writ of Error. Filed June 8, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error.

vs.

TROJAN POWDER COMPANY a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including July 10, 1917, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and N. H. F. including the 10th day of July, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated June ——, 1917.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.

NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. H. HUNT,
Judge.

Dated June 18, 1917.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jun. 18, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

TROJAN POWDER COMPANY, a Corporation,

Defendant in Error.

Stipulation and Order Enlarging Time to and Including August 10, 1917, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the plaintiff in error above named may have to and including the 10th day of August, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 7th, 1917.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.
NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. M. MORROW,
Judge.

Dated July 9th, 1917.

[Endorsed]: No. ——. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Plaintiff in Error, vs. Trojan Powder Company, a Corporation, Defendant in Error. Stipulation and Order Enlarging Time for Docketing Cause on Writ of Error. Filed Jul. 9, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation,
Plaintiff in Error,
vs.
TROJAN POWDER COMPANY, a Corporation,
Defendant in Error.

Stipulation and Order Enlarging Time to and Including August 31, 1917, to Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the

plaintiff in error above named may have to and including the 31st day of August, 1917, within which to prepare and print the record and to file and docket this cause on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit. This stipulation is signed on condition the above cause is placed on the October, 1917, calendar.

Dated August 9, 1917.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Attorneys for Plaintiff in Error.
NATHAN H. FRANK,
IRVING H. FRANK,
Attorneys for Defendant in Error.

It is so ordered.

WM. W. MORROW,
Judge.

of this Insurance or any part thereof without prejudice to this Insurance the charges
hereby insured AND (it is expressly declared and agreed that the acts of Insurer or
ured shall not be considered a waiver or acceptance of abandonment) AND it is declared
eds Hides Skins and *Molasses* ———————————— shall be and are warranted
k or burnt or unless caused by collision with any other Ship or Vessel and that Sugar
n average under Five Pounds per centum and that all other Goods and also Ship and
Three Pounds per centum unless general or the Ship be stranded sunk or burnt.
for loss or damage to the interest insured under this policy same shall be reported as
. No. 1 Cornhill E. C. London or Messrs. Brodrick Leitch & Kendall No. B 18 Liver-
ereunder shall be paid at the office of this Company in San Francisco or at the office
e of loss signed by Joseph Hadley Esq. or Messrs. Brodrick Leitch & Kendall.
E COMPANY has caused these presents to be signed by its duly authorized officers

———— day of ———————— one thousand nine hundred and ————
Marine Agent.

WM. J. DUTTON,
President.

Plaintiff's Exhibit No. 1—Policy of Insurance, August 7, 1912, on Steamer "Pleiades" (Original).

ORIGINAL

CARGO—ENGLISH FORM

FIREMAN'S FUND INSURANCE COMPANY

SAN FRANCISCO, CALIFORNIA

All Policies issued abroad and made payable in the United Kingdom are required by law to have a Government Stamp of one penny per £100 affixed within ten days after date of receipt in the United Kingdom.

No. 307264

£ $35,000

Warranted free of capture, seizure and detention and the consequences thereof or of any attempt thereat piracy excepted and also from all consequences of riots, civil commotions, hostilities or warlike operations, whether before or after declaration of war.

It is hereby agreed that the rights of the assured shall not be prejudiced by the insertion in the bill of lading of the London conference rules of affreightment 1893, or of the following clause:

"The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, thieves, arrest, and restraint of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master mariners, or other servants of the shipowners."

Warranted free from average unless general or the ship or craft be stranded, sunk or burnt, each craft or lighter being deemed a separate insurance.

Underwriters notwithstanding this warranty to pay for any damage caused by fire or by collision with any other ship or vessel or with ice or with any substance other than water and any special charges for warehouse rent, reshipping or forwarding for which they would otherwise be liable, also to pay the insured value of any package or packages which may be totally lost in trans-shipment.

WHEREAS it hath been proposed to the FIREMAN'S FUND INSURANCE COMPANY by Trojan Powder Co.

as well in his or their own name as for and in the name and names of all and every other person or persons, to whom the subject matter of this policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described.

Now this Policy Witnesseth that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of One Hundred & Seventy-Five and 00/00ths.....DOLLARS as a premium at and after the rate of ½% per cent for such Insurance the said Company takes upon itself the burthen of such Insurance to the amount of Thirty-Five Thousand and 00/100.....DOLLARS

and promises and agrees with the insured their Executors, Administrators and Assigns in all respects truly to perform and fulfill the Contract contained in this Policy. AND it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from San Francisco Bay to Balboa.

AND it is also agreed and declared that the subject matter of this Policy as between the Assured and the said Company so far as concerns this Policy shall be and is as follows upon $35,000—on 6000 cases High explosives.

laden (under deck) on board the Ship or vessel called the Str. "Pleiades"

General average payable as per Foreign Statement or per York-Antwerp Rules of 1890 if in accordance with the Contract of Affreightment Warranted that should the vessel ground within the limits of the Columbia and/or Willamette and/or Fraser Rivers and/or Suez Canal and/or Manchester Ship Canal or its connections and/or in the River Mersey above Rock Ferry Slip, such grounding not to be deemed a stranding, but Underwriters to pay for any damage which may be proved to have directly resulted therefrom.

In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage. Including risk of craft and boats to and from the ship or vessel each craft or boat to be deemed a separate risk.

All questions of liability arising under this policy are to be governed by the laws and customs of England. This Policy is issued in duplicate. Freight warranted free from any claim consequent upon loss of time whether arising from a peril of the sea or otherwise.

The preceding clauses and all clauses annexed hereto or stamped hereon shall control other printed conditions inconsistent with the same.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said Freight Goods and Merchandise from the time when the Goods and Merchandise shall be laden on board the said Ship or Vessel Craft or Boat *as above* and continue until the said Goods and Merchandise be discharged and safely landed at *as above* AND that it shall be lawful for the said Ship or Vessel in the Voyage so insured as aforesaid to proceed and sail to and touch and stay at any Ports or Places whatsoever without prejudice to this Insurance AND touching the Adventures and Perils which the said Company is content to bear and does take upon itself in the Voyage so Insured as aforesaid they are of the Seas Men-of-War Fire Enemies Pirates Rovers Thieves Jettisons Letters of Mart and Counter Mart Surprisals Takings at Sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality soever Barratry of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof AND in case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labour and travel for in and about the Defence Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance the charges whereof the said Company will bear in proportion to the sum hereby insured AND (it is expressly declared and agreed that the acts of Insurer or Insured in Recovering Saving or Preserving the Property Insured shall not be considered a waiver or acceptance of abandonment) AND it is declared and agreed that Corn Fish Salt Saltpetre Fruit Flour Rice Seeds Hides Skins and *Molasses* ———————— shall be and are warranted free from average unless general or the Ship be stranded sunk or burnt or unless caused by collision with any other Ship or Vessel and that Sugar Tobacco Hemp and Flax shall be and are warranted free from average under Five Pounds per centum and that all other Goods and also Ship and Freight shall be and are warranted free from average under Three Pounds per centum unless general or the Ship be stranded sunk or burnt.

It is hereby understood and agreed that in case of claim for loss or damage to the interest insured under this policy same shall be reported as soon as goods are landed or loss known to Joseph Hadley Esq. No. 1 Cornhill E. C. London or Messrs. Brodrick Leitch & Kendall No. B 18 Liverpool and London Chambers Liverpool; and that all claims hereunder shall be paid at the office of this Company in San Francisco or at the office of Messrs. Brown Shipley & Company London upon certificate of loss signed by Joseph Hadley Esq. or Messrs. Brodrick Leitch & Kendall.

In Witness Whereof the FIREMAN'S FUND INSURANCE COMPANY has caused these presents to be signed by its duly authorized officers

in the CITY OF SAN FRANCISCO, STATE OF CALIFORNIA, this ———— day of ———————— one thousand nine hundred and ————

Not valid unless countersigned by GEORGE E. BILLINGS, Marine Agent.

A. M. FOLLANSBEE, Jr.,
Marine Secretary.

WM. J. DUTTON,
President.

Countersigned August 7, 1912. Geo. E. Billings, Marine Agent. By R. C. Ward.

ORIGINAL

ENGLISH CARGO

FIREMAN'S FUND INSURANCE COMPANY

—OF—

SAN FRANCISCO, CALIFORNIA

No. 307264

Date August 7, 1912.

Vessel

"Pleiades"

Trojan Powder Co.

£ $35,000 *at* ½ %

£ $175.00

Geo. E. Billings Roy C. Ward Jas. K. Polk
J. C. Meussdorffer Jas. W. Dean

GEO. E. BILLINGS CO.
INSURANCE BROKERS and
AVERAGE ADJUSTERS

312 CALIFORNIA STREET

Phones DOUGLAS 2283
HOME C 2899 SAN FRANCISCO, CAL.

[Pasted across face of policy]:

PLEASE READ YOUR POLICY

This Policy is written in exact accordance with our information. If there are any points or alterations of which we have not been advised, your policy may be incorrect. If in doubt, phone, write or call upon

GEO. E. BILLINGS CO.

[Endorsed]: No. 15,660. U. S. Dist. Court, Nor. Dist. of Cala. Pltffs. Exhibit 1. 5/22/14. W. B. M., Clerk.

No. 3037. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 1. Filed Aug. 24, 1917. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 2—Bill of Lading Issued by California-Atlantic Steamship Company to Trojan Powder Co. (Original).

(1-8-12 10M)

CALIFORNIA-ATLANTIC STEAMSHIP CO.

[House Flag] BATES & CHESEBROUGH, General Agents

and

PANAMA RAILROAD CO.

In Connection with other Carriers on the Route

Marks and Numbers.

I. C. C.
Port of Ancon
W. O. 32980
Z. R. 1857-C

Freight from San Fran. to Balboa

via.................................Line.

..........feet @..........per 40 Cubic feet ....

..........lbs. @.......... " 2240 lbs. English ....

360000 — 4050.00
~~333333~~ lbs. @ 22.50.... " 2000 lbs. English...~~$3375.00~~

..........lbs. English @..........per 100 lbs ....
(101 4-10 lbs. English—100 lbs. Spanish.)

Value....................@ % ....

Charges Advanced...

Landing charges............................... 900.00
~~150~~ 180 tons at $5 per ton........................ ~~750.00~~

Total 4950.00

☞ Rates, weight and/or measurement subject to correction. One pound sterling to be considered equal to $4.80 United States gold currency; except that when freight is prepaid, $4.86 United States gold is equivalent to £1 sterling. When freight to the following countries is expressed in sterling, the rate per £ to be: Germany, Marks, 20.50; France, Francs, 25.25; Italy, Lire, 25.25; Spain, in Spanish money at current rate of exchange.

Minimum Bill of Lading, £1.11.6.

Received payment S. W. Good,
For the Company.

State Toll............................

(The Signature of the Agent here acknowledges only the amount Prepaid.)

[Stamped across face]: Freight Prepaid.

[Stamped in margin]: Prepaid.

Extract from the Laws of the United States Relating to Steamboats.—"Section 8. And be it further enacted that hereafter all Gunpowder, Oil of Turpentine, Oil of Vitriol, Camphene, or other explosive burning fluids and materials which ignite by friction (Matches, etc.) when packed and put up for shipment on board any such vessel (steamer carrying passengers) shall be securely packed or put up separately from each other and from all other articles, and the package, box, cask or vessel containing the same shall be distinctly marked on the outside with the name and description of the articles contained therein; and every person who shall pack or put up, or cause to be packed or put up for shipment on board of any such vessel, any Gunpowder, Oil of Turpentine, Oil of Vitriol, Camphene, or any other explosive burning fluids or materials that ignite by friction, otherwise than aforesaid, or shall ship the same, unless packed and marked as aforesaid on board any steam vessel carrying passengers shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding eighteen months, or both."—See back of Bill of Lading, Condition 5.

Voy 10 B./L. 1

Received by the CALIFORNIA-ATLANTIC STEAMSHIP CO.

At the port of San Francisco..

From Trojan Powder Company..

under the contract hereinafter contained the property mentioned below, marked and numbered as follows or as per margin (but countermarks always excepted), in apparent good order and condition (weight, contents and value unknown), viz:—

six thousand (6000) Trojan Powder

Consigned to Isthmian Canal Commission..............................at Balboa ....

to be transported by steamship "Pleiades"...............................appointed to sail Aug. 10th............ or by any other or succeeding steamer or vessel, whether belonging to said corporation or to any other owner, to the port of Ancon, and there, if that be their port of consignment, to be delivered to consignee or his assigns, if called for by him or them, as in this contract provided, he or they paying freight and charges thereon (unless prepaid), and average, if any; or if consigned beyond, to be there delivered to connecting carrier and so on by one connecting carrier to another until they reach the port or place of consignment. The said California Atlantic Steamship Co. is hereby expressly granted the right and option of delivering the merchandise represented by this Bill of Lading to consignee from alongside, or of landing and storing said merchandise either in lighters, hulks or wharf, or in warehouse immediately upon the arrival of said Steamer at the port of discharge of said merchandise, without notice to and at the expense of consignee; and in the event of its so landing and storing said merchandise, said Company is thereupon hereby released from all further liability for loss or damage thereafter, whether arising from fire or from any other cause.

Each carrier shall be bound (subject to the limitations and exceptions contained in this contract, whether printed or written on the face or back hereof) to deliver said goods in the same order and condition as that in which it received them; and the ultimate carrier to deliver them at its station, anchorage or wharf, in the customary manner to the consignee or his assigns, if called for by him or them, as in this contract provided, he or they paying freight and charges thereon before delivery if required (unless prepaid), and average, if any, according to York-Antwerp Rules, or at carrier's option, as to matters not therein provided for, according to usages of the vessel's home port. General average when happening to a steamer of the California Atlantic Steamship Co. to be adjusted according to the laws of the United States. If the owner shall have exercised due diligence to make the steamer in all respects seaworthy, and to have her properly manned, equipped and supplied, it is hereby agreed that, in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the steamer, or from any latent defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discovered by the exercise of due diligence), the consignees or owners of the cargo shall nevertheless pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel, or any latent defect or unseaworthiness. Any mails carried to be exempted from contribution to General Average.

Clean coffee must be designated as such in the bill of lading, or the freight for shell coffee will be charged.

It is agreed that said freight, whether prepaid or to be collected, is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, and on the happening of any of the herein excepted contingencies the carriers are to have the right to forward the above-mentioned packages to the ports of destination on their own routes, and shall receive extra compensation for such service, whether performed by their own vessels or those of strangers; and in case of salvage services rendered to aforesaid merchandise or treasure, during the voyage, by vessel or vessels of the carriers, such salvage service shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

Every carrier is liable to the preceding carrier for all accrued charges; and, in the event of loss of the property after transfer from one carrier to another, the carrier having the property in charge when the loss occurs shall have a lien on the remaining property, if any, for all such advances.

It is mutually agreed that the liability of each carrier, as to goods destined beyond its own route, shall be terminated by proper delivery of them to the next succeeding carrier. This bill of lading is signed for the different carriers who may be engaged in the transportation, severally, not jointly, and each of them is to be bound by and have the benefit of all the conditions thereof as if signed by it, the shipper, owner and consignee. The acceptance of this bill of lading is an agreement on the part of the shipper, owner and consignee of the goods to be bound by all of its stipulations, exceptions and conditions as fully as if they were all signed by such shipper, owner, and consignee. This bill of lading shall have the effect of a special contract not liable to be modified by a receipt from or any act of an intermediate carrier, but as to steamers employed by the California-Atlantic Steamship Co. and the Panama Railroad Company, subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress of the United States approved on the 13th day of February, 1893.

And it is further agreed that after customary notice to the consignee or owner of the arrival of the property described herein at the destination or point of delivery named in this bill of lading, and a reasonable period allowed thereafter for its removal from warehouses or cars, storage charges as usually applicable at such point of delivery may be made and collected on the property remaining undelivered; and such demurrage charges made and collected on loaded cars as the delivering road may have established.

In Witness Whereof, 2 bills of lading, all of this tenor or date, have been signed, one whereof being accomplished, the others to stand void.

Dated at San Francisco, this 10th day of August, 1912.
Shippers are requested to read this contract, including conditions on back.

Accepted..Shippers.

S. W. GOOD,
For California-Atlantic Steamship Co. and Connecting Carriers.

CONDITIONS OF THIS BILL OF LADING.

1. The carriers shall have liberty to transfer the goods to and transport them by lighters, barges, or any other vessel than that named, to lighter from steamer to steamer and from steamer to shore, or from shore to steamer, and shall have liberty to sail without pilots, to tow and assist vessels in any situation, and go to or stop at any port or ports en route or beyond, and to deviate, with like privilege to stop. It is agreed that the goods may be lightered, ferried or carted to the consignee or a connecting carrier in Bay of Panama or elsewhere at the owner's risk. The Panama Railroad Company will not be responsible for loss or damage to goods or treasure from fire in cars, in warehouse, on wharf, or in lighters in the Bay of Panama.

2. No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits conveyance from any point of transshipment, and in case the whole or any part of the property specified herein be prevented by any cause from going from port in the first steamer of the line stated, leaving after the arrival of such property at the port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary by any other steamer or route.

3. No carrier, or the property of any, shall be liable for gold, silver, precious stones or metals, jewelry, or treasure of any kind, bank notes, securities, silks, furs, laces, pictures, plate, china, glass or statuary, unless bills of lading are signed therefor, in which their nature and value are expressed and extra freight expressed and paid for the assumption of extraordinary risk nor for any loss or damage arising from any of the following causes, viz.: fire from any cause, on land or on water, jettison, ice, freshets, floods, weather, pirates, robbers, or thieves, acts of God or of the country's enemies; riots, strikes, or stoppage of labor, collisions, explosions, accidents to boilers or machinery, or any latent defect in hull, machinery or appurtenances; or unseaworthiness of the ship, even existing at time of shipment or sailing on the voyage, provided the owners have exercised due diligence to make the vessel seaworthy; stranding, straining, any accident on or perils of the seas or other waters, or of steam or inland navigation; restraints of governments, legal process, claims of ownership by third parties, detention or accidental delay; want of proper cooperage or mending, insufficiency of package in strength or otherwise, use of hooks, rust, dampness, loss in weight, leakage, breakage, sweat, blowing, bursting of casks or packages from weakness or natural causes, evaporation, vermin, frost, heat, smell, contact with or proximity to other goods, natural decay, or exposure to weather; nor for any act, neglect or default whatsoever of the pilots, masters, mariners or other servants or agents of the steamers, or for loss or damage of any kind on goods packed in bales or whose bulk or nature requires them to be carried on deck or on open cars, or for the condition of packages or any deficiency in the contents thereof, if receipted by the consignees as in good order; or for any injury that may happen under any circumstances to, or for the death of any living creature that may be embarked, or sent for embarkation, on board the carriers.

4. All liability under this Bill of Lading shall be determined on the basis of the actual market value of the goods at the time of ship's entry at port of destination, but the Carriers shall not be liable for any value exceeding one hundred dollars ($100.00) U. S. Gold upon each package, unless the value exceeds that amount, is so expressed in the Bill of Lading, and extra freight paid thereon, as per tariffs; and shipper covenants that such claims shall in no case exceed $100 for loss of or damage to or for conversion of any one of said packages unless a greater package valuation be written hereon.

5. Explosive, inflammable, or other dangerous articles may be transported, if the carrier chooses, on deck or elsewhere, and they shall, in all cases, be at the owner's risk. If any such articles be secretly delivered to the carrier, the shipper shall be responsible for any damage resulting therefrom, and such articles may be destroyed by the carrier without incurring any liability therefor.

6. All articles named in this bill of lading are subject to charges for necessary cooperage and repairs. No liability shall exist for wrong carriage or delivery of goods marked with initials or imperfectly marked, unless name and address of consignee be given in writing at time of shipment; such marking being agreed to be taken as proof of contributory negligence. Should it be found on the cargo being discharged that goods have been landed without marks or with marks differing from those on the bill of lading, or with marks and numbers not distinguishable, the same shall be apportioned to the different lots, and consignees shall conform to such allotment. All claims for damage to goods must be made and the nature and extent thereof fully disclosed, in the presence of the agent of the company having the same then in custody, before they are removed from the station or wharf. Unless written demand for damage shall be made upon the carrier liable therefor, or upon the carrier which actually delivered the goods, within ten days after delivery, all claims for damage shall be taken to have been waived, and no suit shall thereafter be maintainable to recover the same. No agent or employee shall have authority to waive such demand.

7. Also that if the ship is prevented by Quaratine from reaching her destination, or making due delivery of the goods, or is detained at quarantine, the goods may be forthwith, without previous notice to shipper, owner or consignee, discharged into depots, lazarettes, hulks, crafts or lighters at the risk and expense of shipper, owner and consignee, all and any of them, and such discharge shall be deemed a full and final delivery of the goods, all risk, responsibility and expenses of the carrier therefor, as carriers, bailee or otherwise, ending as soon as the goods are delivered from the ship's tackle, and all expenses thereby or thereafter incurred, and all increased cost of such delivery shall be paid by shipper, owner and consignee, all and any of them, the carrier retaining a lien on the goods therefor; but should the vessel or goods not be admitted, or such discharge be impracticable, or so in the master's opinion, the carrier may forthwith without previous notice proceed to the nearest safe port, or at ship's option to the nearest safe port to which the ship is bound, at the risk and expense of shipper, owner and consignee, all and any of them, and there land the goods as if at the original port of discharge, at the risk and expense of shipper, owner and consignee, all and any of them, he and they paying freight from the original port of discharge, and the carrier retaining a lien on the goods therefor and for all costs, charges and expenses incurred, and for all increased cost of delivery; and all risks, and expenses incurred thereafter shall be on account of shipper, owner and consignee. The several carriers shall have a lien upon the goods specified in this bill of lading for all arrearages of freight and charges due by the same owners or consignees on other goods. In case of loss, detriment or damage to the goods or delay in the transportation thereof, imposing any liability hereunder, the carrier in whose actual custody they were at the time of such loss, damage, detriment or delay, shall alone be responsible therefor. The receipt of any carrier for the goods shall be prima-facie evidence of the condition in which he received them in a suit against any other carrier. None of the carriers under this bill of lading will be responsible for deterioration or damage to cargo caused by fumigation or disinfection ordered by the sanitary authorities.

8. When the loading, transport, transshipment or delivery is prevented in consequence of ice, weather, epidemic, quarantine, sanitary measures, blockade, war, sedition, strikes, troubles, labor agitations, and all analogous circumstances whatever, the Captain, the Company or the Agents shall be entitled to load, discharge, tranship, put into warehouse or quarantine depot, or into a lighter, hulk or craft, and to deliver all or any part of the goods, whether the terminus of the voyage or not, and all risks whatsoever, and all expenses of transshipment or warehousing of Customs, including Surtaxe d'Entre Pot, and all extra expenses of whatsoever kind incurred in consequence of the above circumstances will be entirely for account of the shipper, consignee or party claiming the goods; even though some part of such extra expenses may be occasioned by the fault of the Captain or shipowner; the Master and Owner being discharged from all responsibility on the goods being placed in charge of the Custom House or any Mercantile Agent or Consul.

9. The goods shall be received by the owner or consignee at the station or wharf of the carrier at the ultimate point of delivery, in lots or parts of lots, and if not taken away within twenty-four hours after arrival may, at the option of the delivering carrier, be sent to a warehouse, or be permitted to lie where landed, all at the expense and risk of the shipper, owner or consignee. If no address of a person at the ultimate point of delivery, immediately entitled to such delivery be disclosed by this bill of lading, the same must be furnished by the shipper, owner or consignee, in writing, to the terminal carrier, before the time at which in ordinary course of transportation the goods should arrive at such point. A failure to do this or remove the goods within twenty-four hours after their arrival shall, in case of any subsequent loss of or injury to the latter, be treated as conclusive proof of negligence on the part of the shipper, owner or consignee, which contributed to such loss or injury. Negligence shall not be presumed as against any carrier under this bill of lading, and no liability shall exist therefor without actual and affirmative proof thereof.

10. If destination is a seaport, the ship may commence discharging immediately on arrival and discharge continuously, the Collector of the Port being hereby authorized to grant a general order for discharge immediately on arrival. Goods to be delivered at ship's tackles, and all charges from thence, including quay expenses, weighing, and delivering to be borne by consignee. If the goods be not taken by the consignee within such time as is provided by the regulations of the port of discharge, they may by the carrier be sent to store, permitted to lie where landed, or returned to the port of shipment, at the expense and risk of the owner, shipper or consignee.

11. Cargo for Callao to be delivered to the Custom House or Muella Darsena, under receipt, which receipt will relieve the carrier from all responsibility. Five shillings per ton extra will be charged on all goods landed by the Muella Darsena Co. at Callao, but the Steamship Company's responsibility shall cease immediately the goods have left the steamer's tackle. In the other ports of South America, and in the ports of Central America and Mexico, the cargo will be discharged by the agent of the carrier, for account and risk of owners of the goods, the landing charges being for their account, and the articles named, in this bill of lading shall be taken away by the consignee thereof immediately after the arrival of the steamer at the port of destination, or the same may be stored at the expense and risk of the owner, shipper or consignee thereof, or carried forward to steamer's destination and landed on her return for account and at the risk and expense of whom it may concern. In case the surf or state of the weather or other conditions upon the arrival of the steamer, shall be such as to render it, in the judgment of the Captain, impracticable to land goods at the ports to which they are destined, or if, from delay or neglect of the consignees, or other causes, the goods or any part thereof, be not transshipped, taken from alongside or landed at any port, the same may be discharged into quarantine depot, or into a lighter, hulk or craft, or be taken to convenient port, and be transshipped, or landed and stored and reshipped, or retained on board, and be forwarded or delivered on a subsequent opportunity, in either case at the risk and expense of the consignee and/or owner of the goods. It is also expressly stipulated and agreed that the within described freight shall not be landed without the proper permission of the Custom House authorities of the port of destination, and if the consignees fail to obtain this, the cargo shall be conveyed back to Ancon for their account and risk at regular through rates. It is understood and agreed that all charges demanded of the steamer for landing this cargo shall be paid by the consignees of same. The carriers are not responsible in respect of goods for France for any Surtaxe d'Entre Pot. In the event of the goods being consigned with option of delivery at another port than the port of consignment named hereon, the port of delivery selected is to be declared at the first of said ports called at by the steamer, within one hour from the time of the steamer's arrival at that port. Failing such declaration, the carriers reserve to themselves the right to discharge the goods at the port of consignment, such goods thereafter to be at the risk and expense of the consignees or owners of the goods.

12. In case of the blockade or interdict of the port of delivery or transshipment, or if, without such blockade or interdict, the entering of the port should be considered by the Master unsafe by reason of disease, war, or disturbances, he is to have the option of landing the goods at any other port which he may consider safe, at shipper's or consignee's risk and expense; and on the goods being placed in charge of the Custom House or any mercantile agent or consul, and a letter being put into the post addressed to the shipper or consignee if named, stating the landing and with whom deposited, the goods to be at shipper's or consignee's risk and expense, and the master and owner discharged from all responsibility. The California-Atlantic Steamship Company reserves the right, in event of any trouble arising between the Company and any of the Central American Republics, to store the cargo at the risk and expense of owner, shipper, and/or consignee until such time as it may be convenient to carry the same forward for delivery.

13. Carrier shall have a lien on said property for all fines imposed on it and for all expense to it resulting from shipper's failure to furnish proper Consular or Custom House papers in due time or resulting from other errors or omissions of shippers, and all such fines and expenses shall be reimbursed to Carrier by consignee before said property shall be delivered to him.

14. It is agreed that the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the connecting steamship company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein.

15. It is agreed that this bill of lading, duly endorsed, shall be given up to the last carrier, if required, in exchange for delivery order.

16. That merchandise on wharf or in warehouse awaiting shipment, transshipment or delivery be at owner's risk of loss or damage by fire, flood and/or the giving away or falling or destruction in whole or part of the warehouse or the wharf or any structure thereon, not happening through the fault or negligence of carrier or representative.

17. It is expressly stipulated and agreed that the California-Atlantic Steamship Company shall not be liable for destruction of or damage to goods by fire while upon its vessel, or before loading thereon or after unloading the same therefrom, unless such fire is caused by the design or neglect of said Company.

18. In the event of any cargo being accepted and carried with freight charges to collect at destination, and if through insufficiency of containers or any other cause whatsoever, such Cargo or any part thereof is refused by the connecting carriers, and the Carrier having such Cargo in possession at the time of such refusal is compelled to return the same to the port of origin or otherwise dispose of the same, all freight and other charges and all expenses of every nature whatever, that may be reasonably incurred in the rehandling and/or discharge of said Cargo, shall be a charge and lien upon and against said Cargo, payable by the Shipper, Owner and/or Consignee, prior to taking delivery or effecting reshipment of such Cargo.

19. It is further mutually agreed that all questions arising under this bill of lading are to be governed by the laws of the country of the carrier to whose acts such questions are attributable.

[Endorsed]: No. 15660. U. S. Dist. Court, Nor. Dist. of Cala. Pltff. Exhibit 2. 5/22/14. W. B. M. Clerk.

No. 3037. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's No. 2. Filed Aug. 24, 1917. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 3—Notice of Abandonment.

NOTICE OF ABANDONMENT.

To the Fireman's Fund Insurance Company of San Francisco.

Gentlemen:—

Please take notice: That the Trojan Powder Company, insured in the sum of Thirty-five Thousand 00/100 Dollars under your policy No. 307,264, dated August 7th, 1912, on Six Thousand Cases High Explosives laden on board the Ship or vessel called the Steamer "Pleiades," hereby abandons the said Six Thousand cases High Explosives laden on said vessel to your Company and claims of you as for a total loss under said policy.

The foregoing abandonment is made because the said Steamer "Pleiades" laden with said explosives on or about the 16th day of August, 1912, while on a voyage from San Francisco Bay to Balboa was wrecked at or near Cape San Lazaro—Lower California, as the result of which the said Six Thousand cases of High Explosives became and are a total loss.

Dated San Francisco, August 29, 1912.

TROJAN POWDER COMPANY.
By W. P. MULHEM,
Manager.

[Endorsed]: Notice of Abandonment. Trojan Powder Company to Fireman's Fund Insurance Company of San Francisco. Case No. 3037. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit No. 3. Filed Aug. 24, 1917. F. D. Monckton, Clerk. No. 15,660. U. S. Nor. Dist.

Court of Cal. Pltfs. Exhibit 3. 5/22/14. FDM., Clerk.

Aug. 29th, 1912, 12.25 P. M.

Received the original, of which the within is a copy—Abandonment not however accepted.

FIREMAN'S FUND INSURANCE COMPANY,

By C. A. & R. PAGE.

[Endorsed]: No. 3037. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Co. vs. Trojan Powder Company. 22 Orders Under Rule 16 Enlarging Time to August 31, 1917, to File Record Thereof and to Docket Case. Refiled Aug. 22, 1917. F. D. Monckton, Clerk.